TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION, APPELLANT,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 1, 1944.

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[fol. 1] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Respondent

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Respondent

(Case No. 4)

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENTS OF ERROR, AND PRAYER FOR REVERSAL—Filed April 28, 1944

The State Farm Mutual Automobile Insurance Company, an Illinois corporation, considering itself aggrieved by the decision and final judgment of the Supreme Court of the State of Wisconsin rendered on January 18, 1944, motion for rehearing of the decision and judgment therein having been denied on March 14, 1944, in the above entitled cause, which said decision and judgment affirmed the judgment of the Circuit Court for Dane County, Wisconsin, dismissing the action brought by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and holding that [fol. 2] Section 201.18 of the Wisconsin Statutes is constitutional and valid, although there was drawn in question the constitutionality of said law as applied to appellant under the Fourteenth Amendment to the Constitution of the United States of America, and under the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United

States herein to the end that said decision and judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of bond required of appellant herein on such appeal and fixing the terms and conditions of a stay of proceedings pending such appeal and such other order and terms as may be just and proper.

Assignments of Error

The said appellant assigns the following errors in the record and proceedings of the Supreme Court of the State of Wisconsin: (These errors result from the construction placed by the Supreme Court of Wisconsin in a judgment and decision of January 18, 1944, (244 Wis. (adv. sh.) 429), upon a statute of Wisconsin (Section 201.18). This statute relates to unearned premium reserves required of insurance companies to reflect present and future estimated liabilities. The Wisconsin Supreme Court held that under said section of the Wisconsin Statutes, the appellant, an Illinois corporation, is required, as a condition to carry on business in Wisconsin, to create an unearned premium reserve upon membership fees collected in thirty-eight other states in which appellant is licensed. Under the laws of Wisconsin the membership fee is held to be a part of the premium collected. In the thirty-eight other states the membership fee is held not to be a part of the premium. [fol. 3] Under the laws of such other states the membership fee contract is accepted as binding and lawful, the fee collected is not required to be treated as part of the premium and no obligation of any kind exists for its return as a part of any premium or otherwise. As construed by the Wisconsin Supreme Court, the Wisconsin Statute requires the plaintiff to reflect upon its books an item as a liability, but in the thirty-eight other states as to business done in such states it is not a liability. Wisconsin has no interest in such membership fees and policyholders in Wisconsin can obtain no benefit from a reserve so required. As thus applied, the statute conflicts with the decisions of this court which hold that:

> "• • • the issue remains whether the insurance enterprise as a whole affects the New York (Wisconsin) interests as to give New York (Wisconsin) the

power it claims." *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.)

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States of America as affecting contracts and operations of the said State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, constituted a deprivation of property of the State Farm Mutual Automobile Insurance Company without due process of law and beyond the power of the State of Wisconsin, and therefore invalid as in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 4] (3) The Supreme Court of Wisconsin erred in not holding that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid and void as in violation of the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States of America.

(4) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and its contracts made in states other than Wisconsin, under the existing facts, was invalid as in conflict with Article I, Section 10, of the Constitution of the United States, as impairing the obligation of contracts in violation of said constitutional provision.

(5) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, so far as it purports to require the State Farm Mutual Automobile Insurance Company, an Illinois corporation, to set up reserves on membership fees collected in states other than Wisconsin is invalid and void as violative to the Constitu-

tion of the United States and the decisions of the Supreme Court of the United States under such constitution as affecting contracts and operations of the State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

PRAYER FOR REVERSAL

For these errors the said appellant prays that the judgment of the Supreme Court of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in this appeal.

Robert M. Ries[illegible] P. O. Address: 1 West Main Street, Madison, Wisconsin. Herbert H. Naujoks, P. O. Address: 1 North La Salle St., Chicago, Illinois. (Attorneys for Appellant).

[fol. 5] Service of copy of the within admitted May 3, 1944.

——— ———, [not legible] Assistant Attorney General, Counsel for Appellee-Respondent.

[fol. 6] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

(Case No. 4)

ORDER ALLOWING APPEAL AND FIXING BOND—Filed April 28, 1944

The petition of the State Farm Mutual Automobile Insurance Company, an Illinois corporation, appellant in the above entitled matter, for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, and the assignments of error filed therewith and the record in said cause having been considered;

It Is Ordered, that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin as prayed in said petition, and that the Clerk of the Supreme Court of the State of Wisconsin shall [fol. 7] prepare and certify a transcript of the record and

proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within 30 days from the date hereof.

It Is Further Ordered, that with the filing of the order with the Clerk of this Court, plaintiff shall file with and deliver to the Honorable A. A. McLeod, Clerk of this Court, a power of attorney and appointment as agent for service of all process in all actions and with respect to all claims arising or which may arise by reason of its doing business or its having done business in the state of Wisconsin, or for the collection of any penalties or fines under Section 348.488, Wisconsin Statutes, or under any other similar statute of the State of Wisconsin.

It Is Further Ordered, that the appellant, State Farm Mutual Automobile Insurance Company, an Illinois corporation, execute its bond with surety to be approved by the undersigned, in the sum of Fifty Thousand Dollars ($50,000.00), conditioned that if the State Farm Mutual Automobile Insurance Company, an Illinois corporation, shall pay all penalties and fines which may be imposed under Section 348.488, Wisconsin Statutes, and shall not later than the first day of September, 1944, file with the Clerk of the Supreme Court of Wisconsin, to be held by said Clerk subject to the further order and disposition by this Court, a list of policies written or renewed by defendant in this state during the period between May 1, 1942, and April 30, 1944, and showing as to each policy the name of the person to whom such policy was issued, the date thereof and the amount of premium received therefor, then the said bond shall become void.

[fol. 8] Said bond having been filed with the petition herein and being in due form and in proper amount, is accordingly approved.

In accordance with the terms and the conditions of said bond and the prayer of the petition for allowance of said appeal,

It Is Now Further Ordered, that pending decision of the issues on this appeal and the further order of the Court herein, the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks and employees, agents and attorneys, be and they are hereby restrained and enjoined from interfering with plaintiff's business, agents or members in the State of Wisconsin by enforcing or attempting

to enforce any penalties or other liabilities incurred by plaintiff by reason of any business transacted or things done by the plaintiff in the course of its business in the State of Wisconsin between May 1, 1942, and April 30, 1944, and from interfering with any of the business so done by plaintiff or its agents during said period.

Dated this 28th day of April, 1944.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fols. 9-46] Service of copy of the within admitted May 3, 1944.

Harold H. Persons, Assistant Attorney General, Counsel for Respondent.

[fol. 47] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

(Case No. 4)

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed May 17, 1944

Whereas, the parties to the above entitled action, by their respective attorneys, stipulated and agreed in the Circuit Court for Dane County, Wisconsin, and in the Supreme Court of the State of Wisconsin, that the above entitled actions should be consolidated for purposes of trial and decision in the Circuit Court for Dane County, Wisconsin, and in the Supreme Court of Wisconsin, and such cases were so consolidated and so tried and decided in both of said Courts, and,

[fols. 48-65] Whereas, the issues involved in the above entitled actions were identical except that two separate license years are involved, and,

Whereas, it is agreeable to the parties to the above entitled actions that the Clerk of the Wisconsin Supreme Court transmit to the Clerk of the Supreme Court of the United States a single combination record for both of the above entitled actions,

Now, Therefore, It Is Stipulated and Agreed, by and between the parties to the above entitled actions, by their respective attorneys, that a single combination record may be transmitted to the Clerk of the Supreme Court of the United States combining both of the above entitled actions on appeal to the United States Supreme Court and that the Clerk of the Supreme Court of the United States may print the records in both of said actions as a single record and the presentation of said cases to the Supreme Court of the United States and consideration thereof by the Supreme Court of the United States may be as if a single case only were involved.

Dated at Madison, Wisconsin, this 28th day of April, 1944.

R. M. Rieser, Herbert H. Naujoks, Counsel for Appellant; John E. Martin, Attorney General, by Harold H. Persons, Assistant Attorney General, Counsel for Appellee.

[fol. 66] [Caption omitted]

[fol. 67] In Circuit Court of Dane County

Action Instituted in May, 1942

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Plaintiff,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Defendant

Action Instituted in April, 1943

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Plaintiff,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Defendant

Notice of Appeal—Filed July 20, 1943

Please Take Notice that State Farm Mutual Automobile Insurance Company, plaintiff above named, hereby appeals

to the Supreme Court of the State of Wisconsin from the whole of a Judgment entered in each of the above entitled actions on the 3rd day of July, 1943, a copy of each of such judgments being hereunto annexed marked exhibits A and B and made a part hereof.

Dated July 19, 1943.

R. M. Rieser, Herbert H. Naujoks, Plaintiff's Attorneys.

To: John Martin, Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for the Defendant in each of said Actions.

Myrtle L. Hansen, Clerk of Circuit Court of Dane County, Wisconsin.

Service admitted this 20th day of July, 1943.

Myrtle L. Hansen, Clerk.

Due service admitted this 20th day of July, 1943.

John E. Martin, Attorney for Defendant.

[fol. 68] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

UNDERTAKING ON APPEAL—Filed July 20, 1943

Whereas the plaintiff in each of the above entitled actions appeals to the Supreme Court of the State of Wisconsin from a Judgment made and entered against it in each of said actions in the Circuit Court of Dane County, Wisconsin, in favor of the defendant in said actions and against the plaintiff, on the 8th day of July, 1943, dismissing each of said actions and dissolving and vacating temporary injunctions entered therein and

Whereas subsequent to the entry of said Judgments and pursuant to Stipulations entered in said actions, the court on the 10th day of July, 1943, approved said Stipulations and ordered and directed that in so far as said Judgments dissolve the temporary injunctions or temporary restraining orders in the respective actions above entitled the same shall be stayed for a period of ten (10) days from the date

thereof pending the filing of undertakings and bonds in compliance with which this undertaking is now sub-
[fols. 69-71] mitted,

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Fidelity and Deposit Company of Maryland, a surety company duly organized and existing and duly authorized to transact surety business in the State of Wisconsin, does hereby undertake and promise on the part of the appellant in each of said actions that said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal in each of said actions not exceeding, however, the sum of Two Hundred Fifty ($250.00) Dollars in each of said actions.

And Whereas the appellant is desirous of continuing the stay so granted by the court on the 10th day of July, 1943, and in consideration thereof and of the premises, said Fidelity and Deposit Company of Maryland, a surety company as aforesaid, hereby undertakes and promises to pay to the defendant Morvin Duel as commissioner of insurance of the State of Wisconsin such costs or damages as may be incurred by said defendant in his said capacity or that may be awarded to said defendant by reason of the granting of the order or orders enjoining said defendant from interfering with the plaintiff herein pending said action and said appeal, including all loss or damage which may result from the issuance of said temporary restraining orders or temporary injunctions, while and during the time that such appeal shall be pending and until the same shall be decided upon appeal to the Supreme Court of Wisconsin not exceeding, however, the sum of One Thousand ($1,000.00) Dollars for damages in each of the actions above entitled.

In Witness Whereof, said surety company has caused these presents to be executed by its duly authorized officers and agents and its seal to be affixed hereto this 20th day of July, 1943.

Fidelity and Deposit Company of Maryland, by Reid M. Bergh, Attorney in Fact. (Seal.)

[fol. 72] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

BILL OF COMPLAINT—Filed June 3, 1942

The State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, brings this, its Bill of Complaint, against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for cause of action complains and alleges that:

1. The plaintiff, State Farm Mutual Automobile Insurance Company is and was during all of the times herein mentioned a mutual, non-profit automobile insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois and was and is a citizen and resident of said state with its chief office and principal place of business in the City of Bloomington, County of McLean, State of Illinois.

2. The defendant, Morvin Duel, is now and since September 27, 1939, has been, the duly appointed, qualified and acting Commissioner of Insurance of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, residing in the City of Madison, County of Dane and State of Wisconsin, and defendant's business office is located at the Wisconsin State Capitol, City of Madison, Dane County, State of Wisconsin.

[fol. 73] 3. During the year 1939 plaintiff made application to the Commissioner of Insurance of the State of Wisconsin in the manner and on the forms prescribed by said Commissioner for a license to do the various forms of automobile insurance business in the State of Wisconsin. After due investigation and consideration by the then Commissioner of Insurance, the said Commissioner being satisfied by such investigation that plaintiff had fully complied with all provisions of law applicable to it and that plaintiff's plan of operation, methods and practices in the conduct of its business and the character and value of its assets were

and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin, made and entered a finding and order to this effect and thereupon issued to plaintiff on the 13th day of July, 1939, a license to transact all forms of automobile insurance business in the State of Wisconsin for the license period ending May 1, 1940. A copy of this license is hereto attached and made a part hereof and marked "Exhibit 1". That since said 13th of July, 1939, plaintiff was and is qualified and entitled to transact business and hold property in the State of Wisconsin under and pursuant to the statutes of said state.

4. That plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941, and plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith, and fully and promptly complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle plaintiff to a renewal of said licenses but notwithstanding, such application, compliance with law and payments, the said defendant, as Commissioner of Insurance of Wisconsin, [fol. 74] failed, contrary to law, to renew such licenses for the plaintiff company and the agents at the time the original licenses expired. That on or about the 18th day of May, 1940, the Commissioner of Insurance of Wisconsin, without having previously had any hearing and without opportunity for hearing, issued an order denying a renewal of license to plaintiff to do all forms of automobile insurance business in the State of Wisconsin for the license year ending May 1, 1941.

5. Thereupon this plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff, agents' licenses to each of its agents, and to enjoin and restrain said Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case. Said court action is now pending but is stayed because, pursuant to the provisions of Section 285.06 Wisconsin Statutes and Section 266 of the Judicial Code, as amended, (Sec. 380, U. S. C. A. Title 28) the Commissioner

of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 18, 1940, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin staying the effect of defendant's order and decision of May 18, 1940, pending trial and ultimate disposition of said action and that such stay is still in full force and effect.

6. Thereafter on or before May 1, 1941, plaintiff seasonably and duly made application to the Commissioner of Insurance of the State of Wisconsin for a renewal of license to do the various forms of automobile insurance business in the State of Wisconsin for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff in Wis- [fol. 75] consin, and to that end complied with all conditions and requirements to entitle the plaintiff and its agents to licenses. On or about the 24th day of April, 1941, defendant notified plaintiff that he would refuse to renew plaintiff's license for the year ending May 1, 1942, and on or about the 5th day of May, 1941, the Commissioner of Insurance of Wisconsin issued a written order denying a renewal of license to the plaintiff for the license year ending May 1, 1942. Said order and decision of May 5, 1941, was received by plaintiff on May 6, 1941.

7. Thereupon said plaintiff commenced another action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff, and to enjoin and restrain said defendant Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case.

8. Said proceeding is now pending in the United States District Court for the Western District of Wisconsin but is stayed because pursuant to the provisions of Section 285.06 Wisconsin Statutes and Sec. 266 of the Judicial Code, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin to enforce said order of May 5, 1941, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County,

Wisconsin, staying the effect of defendant's order and decision of May 5, 1941, pending the trial and ultimate disposition of said action and that such stay is still in full force and effect.

9. Thereafter, the above two actions brought by the Commissioner of Insurance of Wisconsin to enforce his orders denying a renewal of license to the Company in the Circuit [fol. 76] Court for Dane County, Wisconsin, were consolidated and heard as one before Honorable Arold F. Murphy, Circuit Judge, who entered an order on July 8, 1941, overruling the demurrers interposed by plaintiff State Farm Mutual Automobile Insurance Company to the original complaints of the Commissioner of Insurance in the suits filed in the Circuit Court for Dane County, Wisconsin, with leave to file an answer within twenty days. The plaintiff, State Farm Mutual Automobile Insurance Company, appealed these orders overruling demurrers to the Supreme Court of the State of Wisconsin.

10. The said Supreme Court of the State of Wisconsin, on January 13, 1942, (240 Wis. 161, 1 N. W. (2nd) 887) made and entered its opinion and decision on demurrer, and solely on the basis of allegations in the complaint, and not on the merits, holding that the use of the life membership plan of the plaintiff company was not permissible under the Wisconsin Statutes and affirmed the said orders of the Circuit Court for Dane County, Wisconsin. Thereafter, plaintiff State Farm Mutual Automobile Insurance Company made a motion for rehearing of the decision of January 13, 1942, and on March 13, 1942, the said Wisconsin Supreme Court made and entered its decision and order denying the said motion for rehearing.

11. In its opinion of March 13, 1942, (2 N. W. (2nd) 871), on motion for rehearing, the Wisconsin Supreme Court restated the basis for its decision in the above causes, in the following language:

> "Some concern is expressed in defendant's brief upon rehearing whether the scope of the opinion is sufficiently circumscribed. While we are of the view that it is, we see no objection to reiterating that the decision is put upon the ground that defendant's plan violates the statutes because of its use of a membership

fee as the consideration for a life privilege—a fee to which is allocated a portion of the expenses of furnishing insurance protection, which is treated as earned at once and against which unearned premium reserves cannot be set up as required by the statutes."

On April 13, 1942, the plaintiff was notified that the remittitur in the aforestid causes was on that day filed in the Circuit Court for Dane County, Wisconsin. Thereupon, plaintiff herein (the defendant in the above actions) duly filed its answers therein and said actions are now pending in the circuit court for Dane County, Wisconsin.

12. Thereupon, on or about the 15th day of April, 1942, the plaintiff State Farm Mutual Automobile Insurance Company, in full compliance in every particular with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department and with the construction of the Wisconsin Statutes relating to the rights of plaintiff and the power and duty of the defendant in the premises by the Wisconsin Supreme Court decisions of January 13, 1942 and March 13, 1942, made a new filing of rates and policy forms with the Commissioner of Insurance of the State of Wisconsin wherein and whereby the said plaintiff abandoned entirely, as of April 27, 1942, the use of its membership fee plan in the State of Wisconsin, and plaintiff, on and after the 27th day of April, 1942, adopted and put in force in Wisconsin a new policy and rates based on a level premium plan for both new and renewal rates. A copy of such schedule of rates and such policy are hereto atached and made a part hereof and marked "Exhibit 2". On and before May 1, 1942, and ever since, plaintiff's plan of operation and its methods and practices in the conduct of its business are, in every particular, in full compliance with all provisions of the Wisconsin Statutes, and more particularly, in full compliance with all provisions of the Wisconsin Insurance Laws and the applicable rules and regulations of the Wisconsin Insurance Department, and plaintiff's methods and practices in the conduct of its business and the character and value of plaintiff's assets are such as to safeguard the interests [fol. 78] of its policyholders and the people of the State. The plaintiff on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance busi-

ness in Wisconsin on the level premium plan for the license period ending April 30, 1943. The level premium plan now used by the plaintiff in Wisconsin is the plan used by most of the automobile insurance companies in the State of Wisconsin and said level premium plan is approved by the defendant for use in Wisconsin.

13. On and before May 1, 1942, and ever since, plaintiff complied fully in every particular with all of the provisions of the laws of Wisconsin, and the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in Wisconsin and for the renewal of its agent's licenses and the appointment of new agents for the license period ending May 1, 1943, and plaintiff has paid all required and lawful fees, charges, and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin for the renewal of plaintiff's license and that of its agents for the period ending May 1, 1943.

14. After the arbitrary and capricious refusal of defendant to issue a renewal of license to plaintiff for the license period ending April 30, 1943, said plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said defendant, as Commissioner of Insurance of Wisconsin, to issue such a renewal of license to plaintiff and to enjoin and restrain said defendant from interfering with plaintiff's [fol. 79] business, agents and members, pending the trial and disposition of such suit. Said suit is now pending in said court and the temporary restraining order issued therein is in full force and effect but the proceedings therein are held in abeyance because, at the suggestion of the Judge of said Federal Court, at a hearing on defendant's motion to dismiss plaintiff's bill of complaint in said Federal Court, it was agreed by counsel, at the said Court's suggestion and with the said Federal Court's approval, that this action be commenced in the Circuit Court for Dane County, Wisconsin, in order to obtain a ruling on the disputed issue by the highest state court. The foregoing procedure was agreed upon because of the contention by counsel for defendant, that the issues raised by plaintiff's action to compel defendant to issue a renewal of li-

cense to plaintiff involved a construction of the powers and duties of defendant under Wisconsin Statutes, which, it was argued by defendant's counsel, had not been completely applied nor construed by the Wisconsin Supreme Court in its opinions of January 13, 1942 (240 Wis. 161, 1 N. W. (2d) 887), and March 13, 1942 (2. N. W. (2d) 871), and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court.

15. The plaintiff, State Farm Mutual Automobile Insurance Company, was organized under the laws of the State of Illinois, and commenced business on June 7, 1922. Thereafter it was licensed to do business and is now lawfully operating in the following states, districts and countries, and it was first licensed in the years shown: Indiana, 1925; Missouri, 1925; South Dakota, 1925; Minnesota, 1926; Tennessee, 1925; Colorado, 1927; Nebraska, 1927; California, 1928; Mississippi, 1928; Montana, 1928; Nevada, 1928; North Dakota, 1928; Texas, 1928; Utah, 1928; Washington, 1928; Arizona, 1929; Idaho, 1929; New Mexico, 1929; West Virginia, 1929; Wyoming, 1929; North Carolina, 1930 (Company later withdrew, but in 1939 again applied for a license and was relicensed); Oklahoma, 1930; Oregon, 1930; Virginia, 1930; Arkansas, 1931; Alabama, 1932; Georgia, 1932; South Carolina, 1932; Delaware, 1933; Maryland, 1933; District of Columbia, 1934; Florida, 1934; Louisiana, 1935; Pennsylvania, 1937; Dominion of Canada 1928; Wisconsin, 1939; New Jersey, 1940. In every single state, district and country, except Wisconsin, the plaintiff has in the regular course annually received its renewal of license. Plaintiff has annually filed in every said state, district and country its sworn financial statement, report or other required data with reference to the solvency, reserves, surplus, methods, plan, operation and financial conditions of the plaintiff, which statements, reports of data have been received, examined, accepted and approved by all of the above Insurance Departments except Wisconsin, as being in full compliance with their laws, rules and regulations. In addition, the financial status and operations of the plaintiff have been regularly examined at intervals by and under the direction of the National Convention of Insurance Commissioners, and plaintiff's methods and plan of operation, the amount of and character of its assets,

its reserves, solvency and surplus have been all approved on each such examination as being adequate and in full and complete compliance in every particular and detail with all of the provisions of the applicable laws, rules and regulations of the states, district and country in which plaintiff so operates, as above set forth.

The license of the company has never been revoked or renewal thereof refused in any state, district or country, except as hereinbefore noted in Wisconsin.

[fol. 81] 16. The plaintiff company is in sound financial condition. Its annual sworn statement as of December 31, 1939, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $18,439,481.93; that its total liabilities as of that date were $13,175,205.12, which included the general or contingent reserve of $2,500,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was $5,264,276.81. Its annual sworn statement as of December 31, 1940, copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $21,490,934.62; that its total liabilities as of that date were $15,598,704.67, which included the general or contingent reserve of $2,750,000. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,750,000, was $5,892,229.95; plaintiff's annual sworn statement as of December 31, 1941, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $25,510,220.50; that plaintiff's total liabilities as of that date were $19,312,790.88, which included the general or contingent reserve of $3,000,000. Plaintiff's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000) was $6,197,429.62.

As of January 1, 1940, the plaintiff, State Farm Mutual Automobile Insurance Company was examined under the authority of the National Convention of Insurance Commissioners of which the Wisconsin Insurance Department is a member, said examination covering the period from June 30, 1936, to and including December 31, 1939. The following states, acting for said National Convention of Insurance Commissioners, participated in said examination: Illinois, Arizona, Oklahoma and Kentucky; a copy of said

report of examination is on file with the Insurance Commissioner of Wisconsin. As of December 31, 1939, said examination showed that the plaintiff company had total admitted assets of $19,152,455.05; that its total liabilities, in-
[fol. 82] cluding a general or contingency reserve of $2,500,000 were $12,871,235.77, and its net surplus over and above all liabilities as of that date, in addition to said contingent reserve of $2,500,000 was $6,281,219.28.

The surplus as shown by the examiners was in excess of the surplus as claimed by the company in the amount of $1,016,942.47. The increased surplus as shown by the examiners is due to the fact that they assigned values to certain assets of the plaintiff company greater than claimed by the company in its annual statement and they found and considered certain liabilities of the company to be less in amount than stated by the company in its annual statement.

The present contingent reserve in the amount of $3,000,000 above referred to was created and exists for any and all possible liabilities of the Company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the Company or its policyholders.

The surplus in the amount of $6,197,429.62 likewise is all available for the above purposes.

17. Plaintiff alleges upon information and belief that, at a hearing upon defendant's motion to dismiss plaintiff's complaint in the suit commenced by plaintiff in the United States District Court for the Western District of Wisconsin, counsel for defendant, in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country.

Plaintiff further alleges that in those states wherein plaintiff operates upon the life membership plan no objection to the use of such plan has been or is being made by the Insurance Departments of such states and such plan is in full compliance with all provisions of the laws and ap-
[fol. 83] plicable rules and regulations thereunder in such states. In the states wherein plaintiff operates on a level premium plan, such states have not and do not object to plaintiff's use of the life membership fee plan in the states wherein plaintiff uses such life membership fee plan.

The life membership fee plan under which the plaintiff company does business in all states, district and country except Texas, Louisiana and Wisconsin where the company does business on the level premium plan and Arizona where the company does business on the unlevel or so-called staggered premium plan, is as follows:

Each applicant for automobile insurance is required to pay a separate membership fee for each general class or kind of automobile insurance which he desires to purchase. The membership fee does not purchase. The membership fee does not purchase insurance and is no part of the premium for insurance. The membership fee varies by insurance coverage and territory. The membership fee on an automobile risk for any given coverage, once paid, is never required to be paid again even though the applicant changes cars or lapses his insurance for a time and later reinstates the insurance. The contractual agreement between the defendant company and the policyholder as respects membership fees is as set out in the insurance policy used in most of such other states, and reads as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverage for which said fees were paid so long as this company continues to write such coverage and the insured remains a desirable risk."

This policy provision is contained in all policies pursuant to Section 1 of Article VII of the by-laws of the corporation, which reads as follows:

> [fol. 84] "Membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy."

The purpose of the membership fee is to defray the expense of securing the new member and the expense of inspection and determining whether the applicant is eligible to belong to a selected, safety-conscious group of automobile owners entitled to purchase and renew automobile insurance in the company at a minimum cost.

Under this plan each applicant as a condition of admission to membership, himself bears the cost of establishing

his eligibility to insure in the company. This relieves the existing policyholders of this cost and thus reduces their expense of insurance. Each new applicant as he comes into the company, pays his own admission cost or expense as fixed by the company and such membership fee is earned at once by the company and is not returnable. Such life membership plan has been continuously used since the organization of the company.

The premiums, which vary as to coverage, type of car and territory where located, are collected separate from and in addition to the membership fees applicable. The first premium paid provides insurance for an original term of six months and the insurance may be automatically renewed for such successive periods of six months each as the required net renewal premium is paid by the insured on or before the expiration of the then current term of insurance. The premium for each six months term of insurance is and always has been entirely earned at the end of each six months' term. The rate of original and renewal premium is based on the underwriting experience of the company for the various coverages, type of automobile, and territories and is fixed by the Board of Directors of the company. Under the life membership plan the company does not make regular periodical payment of dividends to its policyholders, but accomplishes a saving to the policy-[fol. 85] holders by limiting its renewal premium to the approximate net cost of providing insurance protection.

The premiums charged by the company under its plan of operation are 20% to 35% less than the so-called conference rates, depending on the particular class of insurance carried. This lower cost of insurance is due to several factors:

(1) Plaintiff confines its risks to private passenger automobiles and the less hazardous form of commercial cars and selects its risks carefully which results in a more favorable loss ratio than enjoyed by most companies.

(2) All policies are issued in the home office of the plaintiff company which relieves the agents of this work and enables the plaintiff company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business. Policies are not reissued upon renewal of the insurance, as is done by most companies,

which further reduces the company expense of doing business.

(3) It collects its premiums by mail direct from the policyholders which relieve the agents of this work and enables the company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business.

(4) By collecting premiums direct from policyholders it escapes loss through bad accounts with agents suffered by many other companies where the agents collect premiums direct from the policyholders. By this means the company also escapes the cost which most companies have of maintaining accounts current with its agents.

(5) Plaintiff collects all renewal premiums on or before the due date and thus avoids furnishing insurance without receiving the premiums from policyholders. Under the plan used by most companies policies are frequently issued which are never paid for either by the policyholder or the agent. Plaintiff company avoids those losses.

[fol. 86] (6) Since Plaintiff receives premiums on or before the date when due it is able to earn interest on its premium funds or to enjoy the use of these funds in paying losses and expenses. Most other companies extend credit to the agent for sixty to ninety days and thus lose interest on and the use of these funds.

(7) By reason of the fact that the premiums are collected in cash direct from the policyholder the company is relieved of the expense of maintaining special agents in the field to verify accounts with agents and collect overdue premiums from agents.

This plan has been extended and operates in nearly all states of the union and Canada, though not used in Wisconsin, and has proven very successful and satisfactory *of* its policyholders. This plan has not been objected to as in violation of the laws or as being unsound, discriminatory or unreasonable in other states wherein plaintiff now operates on this plan.

The membership fee plan now being used by plaintiff in all states except Wisconsin, Louisiana, Arizona and Texas, has been is recognized as valid and in full compliance with all of the provisions of the applicable laws of such states,

and with the applicable rules and regulations of the Insurance Departments of such other states, and the Plaintiff has complied in every particular with all reserve and other financial and other requirements of such other states and of the applicable laws therein, and all of the business done by Plaintiff in such other states and Plaintiff's operations and practices are in full compliance with all of the laws of the states in which Plaintiff operates. Plaintiff's method and plan of operation in such other states, as well [fol. 87] as in Wisconsin, and the character and value of Plaintiff's assets and reserves are in full compliance with law in such other states, as well as in Wisconsin, and are such as to safeguard the interest of plaintiff's policyholders and the people of the states in which plaintiff operates.

18. Notwithstanding that plaintiff has fully and promptly complied with all laws, rules and regulations lawfully applicable to plaintiff as aforesaid and notwithstanding that plaintiff's plan of operation and its methods and practices in the conduct of its business and the character and value of plaintiff's assets were and are such as to safeguard the interests of its policyholders and the people of the State and that plaintiff is wholly solvent and in a strong financial position, and notwithstanding that it was and is the plain, unequivocal, ministerial duty of the Commissioner of Insurance of Wisconsin to renew plaintiff's license to do business in Wisconsin as aforesaid for the period ending May 1, 1943, and to renew plaintiff's agents' licenses and to permit appointment of new agents of plaintiff, said Commissioner of Insurance of Wisconsin, arbitrarily, capriciously, unreasonably, and in violation of law has refused to issue to plaintiff a license to do all forms of automobile insurance business in Wisconsin for the license year ending April 30, 1943.

19. Such unwarranted, capricious refusal to renew plaintiff's license and that of its agents for the periods from May 1, 1942 to May 1, 1943, unless restrained, will do irreparable injury to plaintiff and to plaintiff's business, for which plaintiff has no adequate remedy at law, except by this action in equity for an injunction herein. The action of defendant unless enjoined would completely destroy the [fol. 88] going business and the good will of plaintiff whereby plaintiff would suffer damages and loss greatly in excess of $25,000,000 and such injury to plaintiff's good

will and reputation would make it difficult, if not impossible, for plaintiff to recover its business, after defendant, as Commissioner of Insurance of Wisconsin, has been compelled to renew plaintiff's license and that of its agents at the end of the litigation.

20. Plaintiff further shows that it verily believes unless defendant is restrained by order of this court, that the said defendant, as Commissioner of Insurance of Wisconsin, will invoke upon this plaintiff large, unjust and unreasonable losses and irreparable losses and damages for which plaintiff has no other remedy at law that is just or adequate and that the writ of injunction is the only writ that can save and preserve to plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner and until defendant has been compelled to renew plaintiff's license for the license year ending May 1, 1943, at the end of this litigation. The plaintiff now has in force in the State of Wisconsin approximately 23,000 risks and plaintiff's annual premium income from such risks is in excess of $400,000 and plaintiff's business is rapidly growing. Plaintiff has established and now maintains in Wisconsin an administrative office and agencies and also a large sales force and staff with loss adjustment bureau. Plaintiff now has in Wisconsin a force of approximately 500 agents, and plaintiff has invested, in organizing and building up such establishment, in excess of $25,000.00.

That prior to the first day of May, 1942, the plaintiff herein seasonably made application for a license for the license year ending May 1, 1943, and in connection therewith furnished all information and complied with all rules and regulations of the department and with all laws of the [fol. 89] State of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to and was and is entitled to a license for the said period. That this proceeding is brought for the purpose of enforcing the rights of the plaintiff to a license for the license year expiring April 30, 1943, and for the purpose of protecting its business and business operations in the State of Wisconsin and to enable the plaintiff to obtain a determination of the issues presented by the defendant in his failure or refusal to grant a renewal of license to plaintiff company for the period ending April 30, 1943.

21. Plaintiff shows that the defendant, as Commissioner of Insurance of Wisconsin, has only such powers and duties as are delegated to the office of the Commissioner of Insurance of Wisconsin pursuant to and by virtue of the statutes of the State of Wisconsin; and that defendant's order refusing to renew plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin for the period from May 1, 1942 to May 1, 1943, was and is wholly erroneous, arbitrary, capricious and without warrant in law and in violation of the positive ministerial duty imposed by statute upon defendant.

22. Plaintiff further alleges that the arbitrary, imperious, capricious, and unlawful refusal of the defendant to issue a renewal of license to the plaintiff for the license year ending April 30, 1943, by reason of the facts set forth herein, deprives the plaintiff of its property without due process of law and denies the plaintiff the due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and the similar provisions of the Constitution of Wisconsin, and im- [fol. 90] poses an arbitrary, unreasonable and unlawful interference with the plaintiff's right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10 of Article I of the United States Constitution.

23. Plaintiff further alleges that if the Statutes of Wisconsin are construed to permit the defendant, as Commissioner of Insurance, to exercise the broad powers said defendant claims, that is, to refuse under section 201.34, Wisconsin Statutes, to renew plaintiff's license for the license period ending April 30, 1943, said statute operates to impose an arbitrary and unreasonable interference with the right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10, Article I of the United States Constitution and said statute as so construed denied to the plaintiff company the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Wherefore the plaintiff respectfully prays that the said defendant, his deputies, clerks, employes, agents, servants

and attorneys be permanently restrained and enjoined from interfering with the plaintiff's business, agents or members in the State of Wisconsin in the conduct by the plaintiff of all forms of automobile insurance business in said state and as incidental to the final judgment herein that the defendant be required to issue to plaintiff and its qualified agents such licenses as are required by law and to which plaintiff and its qualified agents are entitled as set forth herein; that dur- [fol. 91] ing the pendency of this suit a temporary injunction issue restraining said defendant, his deputies, clerks, employes, agents, servants and attorneys and all other persons acting under his authority or by his direction from interfering with the plaintiff's business, agents or members in the State of Wisconsin and the conduct of all forms of automobile insurance business in said state; that pending the issuance of a temporary injunction a temporary restraining order issue enjoining and restraining the defendant his deputies, clerks, employes, agents, servants and attorneys and all other persons acting under defendant's authority or by his direction from interfering with the plaintiff's business, agents or members in the State of Wisconsin in the conduct of all forms of automobile insurance business and that the plaintiff have such other further order, judgment and decree as may be equitable and proper in the premises and for plaintiff's costs and disbursments in this action.

R. M. Rieser, One West Main Street, Madison, Wisconsin; Herbert H. Naujoks, One North LaSalle St., Chicago, Illinois, Attorneys for the Defendant State Farm Mutual Automobile Insurance Company.

Rieser & Mathys, Ekern, Meyers & Matthias, of Counsel.

[fols. 92-94] EXHIBIT I TO BILL OF COMPLAINT

STATE OF WISCONSIN

Department of Insurance

This is to Certify, that the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, has complied with all the provisions of law, and is authorized to transact the business of — (15) Automobile, — in the

State until the first day of May 1940, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 13th day of July, 1939.

——— ———, Commissioner of Insurance. (Seal.)

[fol. 95] *Duly sworn to by Adlai H. Rust. Jurat omitted in printing.*

[fol. 96] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST

ADLAI H. RUST, being first duly sworn, on oath deposes and says that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, plaintiff above named, to-wit: the Executive Vice-President of said plaintiff; that he is familiar with the facts hereinafter set forth; that he makes this affidavit for and on behalf of said corporation, being thereunto duly authorized; that said affidavit is made in support of a motion for temporary restraining order and temporary injunction; that the application for a temporary restraining order and temporary injunction herein is made in connection with a civil action in equity filed in this court to restrain and enjoin Morvin Duel, Commissioner of Insurance of the State of Wisconsin, from interfering with the business of the plaintiff and incident thereto to determine the powers and duties of the defendant as such Commissioner and his duty to issue a license to the plaintiff company for the licensing year ending April 30, 1943; that the Wisconsin Supreme Court on January 13, 1942 and March 13, 1942, made and entered decisions holding that the use of a life membership plan by the plaintiff company in Wisconsin was not permissible under the Wisconsin Statutes, and based its decisions upon its construction of the Wisconsin Statutes to the effect that it was im-

[fol. 97] proper to split premiums and designate part of the premium as a membership fee or separate charge; this conclusion was based primarily upon the construction by the Court of the reserve requirements of the Wisconsin Statutes; that [illegible]il 13, 1942, notice of the filing in the Circuit Cour[illegible] County, Wisconsin, on that date of

the remittitur in said Wisconsin case was received by plaintiff's attorneys and plaintiff thereupon on April 15, 1942, notified the said Morvin Duel, Commissioner of Insurance of the State of Wisconsin that plaintiff would on and after April 27, 1942, abandon in Wisconsin, the use of its life membership plan and that said plaintiff would on and after said April 27, 1942, use in Wisconsin a level premium plan both for new insurance and in renewal of existing policies; that on and after the said 27th day of April, 1942, plaintiff has abandoned the use of its life membership plan in Wisconsin and has operated in Wisconsin solely on the level premium plan as aforesaid.

That the company was legally licensed in Wisconsin on July 13, 1939, and its operations have been and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin; that the plaintiff has in all respects complied with the conditions laid down in the Wisconsin Supreme Court decisions of January 13, 1942, and March 13, 1942; that the plaintiff company has spent large sums of money in building an agency plant and developing its business in Wisconsin, which will be totally and irreparably lost unless the defendant is enjoined and restrained pending final determination of the issues presented herein and as prayed for in the complaint herein; that the company is wholly solvent, with total admitted assets in excess of $25,000,000.00, and that it has surplus over all liabilities in excess of $6,000,000.00 in addition to a contingent reserve of $3,000,000.00, and that the interests of more than 23,000 policyholders in Wisconsin are fully protected and will in nowise suffer by reason of the issuance of a temporary [fol. 98] restraining order or temporary injunction, pending a final determination of the issues herein; that the State of Wisconsin has received all taxes, charges and fees lawfully owing and that the revenues of the State of Wisconsin will not suffer by reason of the issuance of a restraining order or temporary injunction pending a final determination of the issues herein.

Adlai H. Rust.

Subscribed and sworn to before me this 18th day of May, 1942.

Willard S. Stafford, Notary Public, Dane County, Wisconsin. (Seal.)

My commission expires July 23, 1944.

[fol. 99] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER TO SHOW CAUSE—May 19, 1942

Upon reading the verified complaint and the affidavit of Adlai H. Rust herein, and it appearing from the facts shown by said verified complaint and affidavit that before notice can be served and a hearing had on plaintiff's application for a temporary injunction herein, or on the plaintiff's application for a restraining order, immediate and irreparable injury, loss and damage will result to plaintiff, to-wit: Plaintiff's business and plant in the State of Wisconsin would be destroyed and become useless and all activities therein would be suspended and interrupted and its good will and reputation elsewhere would be damaged if defendant's failure or refusal to renew plaintiff's license to do business in Wisconsin for the period ending April 30, 1943, is not restrained and enjoined, inasmuch as plaintiff would be unable to operate lawfully in Wisconsin without a license and no new policies could be solicited or secured by plaintiff through its local licensed agents, and as a result said agents of plaintiff would leave the employment of plaintiff to solicit and secure automobile insurance policies for competitors of plaintiff and the policyholders now residing in Wisconsin would be unable to obtain any services in connection with their policies in this state and this, among other things, would cause said policyholders not to [fol. 100] renew their insurance with plaintiff company, and thus such threatened action of defendant would completely destroy the going business and good will of plaintiff in Wisconsin and such injury and destruction of plaintiff's good will, reputation and business in said State of Wisconsin would make it difficult, if not impossible, for plaintiff to retrieve its business if, upon final determination of this matter, it should be held that the defendant, as Commissioner of Insurance of Wisconsin, is required to renew plaintiff's license to do all forms of insurance business in Wisconsin for the license year ending April 30, 1943; and such injuries are irreparable because they cannot be compensated for in damages and may subject plaintiff to fines and forfeitures; and there is danger that such irreparable injuries are liable to occur, and are threatened

by the failure or refusal of the defendant to renew plaintiff's license before a hearing upon notice can be had;

Now, Therefore, It Is Ordered that the defendant, as Commissioner of Insurance of Wisconsin, show cause before Branch No. 2 of this court at the court house in Madison, Dane County, Wisconsin, on the 3rd day of June, 1942, at 10 A. M. why the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks, employees, agents, and attorneys, should not be restrained and enjoined from interfering with plaintiff's business, agents, or members in the State of Wisconsin, and the regular conduct of the business and affairs of plaintiff, and why pending the entry of final judgment herein the defendant should not permit the plaintiff and its agents and representatives to continue their business and operations as if the defendant had complied with the law and had issued a license to plaintiff and separate agent's licenses to the individual qualified agents appointed by the defendent from time to time. Pending hearing upon this order to show cause and the entry of an order thereon, defendant is hereby restrained and enjoined [fol. 101] from interfering with plaintiff's business, agents, or members in the State of Wisconsin and from taking any steps to prevent the conduct of the plaintiff's business as heretofor-.

This restraining order shall become effective upon the giving of security by the plaintiff by filing an undertaking in the sum of $1,000, conditioned upon the payment of such costs and damages as may be incurred or suffered by said defendant if it should be finally determined that said order was improperly issued or that may be awarded to defendant by reason of the granting of said order.

It Is Further Ordered that a copy of this order be served upon said defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, within three days from the date of this order.

Issued and entered this 19 day of May, 1942.

August C. Hoppmann, Circuit Judge, Branch No. 2.

[fol. 102] In Circuit Court of Dane County

[Title omitted]

Undertaking on Temporary Restraining Order

The undersigned hereby undertakes that the plaintiff above named, the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, shall pay to the defendant above named, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, such costs or damages as may be incurred or suffered by the said defendant, Morvin Duel, or that may be awarded to said defendant by reason of the granting of the order or orders hereinafter described, not to exceed the sum of One Thousand Dollars, including all loss or damage which may result from the issuance of the temporary restraining order now pending or a temporary injunction to be issued after hearing by the court herein if such injunction shall be issued within one year from the date hereof, if it should be finally determined that the said temporary restraining order or the temporary injunction was improperly issued.

Dated this 19th day of May, 1942.

Fidelity and Deposit Company of Maryland. (Seal.)

By: Reid M. Bergh, Agent.

[fol. 103] [File endorsement omitted]

In Circuit Court of Dane County

[Title omitted]

Received copies of the within Answer admitted this 6 day of June, 1942.

R. M. Rieser and Herbert H. Naujoks, Attorney for

Answer—Filed September 17, 1942

Now comes the defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for answer to the complaint herein, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2 and 3 of the complaint except the last sentence allegation of paragraph 3 and as to said

allegation denies that since the 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business or hold property in the state of Wisconsin under and pursuant to the statutes of said state, and in this connection alleges that the plaintiff was not on said date and was not at any time thereafter and is not now qualified and entitled to transact business or entitled to hold property in the state of Wisconsin under the statutes of said state.

2. Admits that the plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941 and that plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith. Denies that the plaintiff fully or [fol. 104] promptly or otherwise complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle the plaintiff to a renewal of its said licenses. Admits that the defendant, as Commissioner of Insurance, refused to renew such licenses for the plaintiff company and its agents at the time that the original licenses expired and alleges that at all times since the defendant has refused to renew same. Denies that said refusal is contrary to law. Denies that the Commissioner's action of May 18, 1940 was without opportunity for hearing and in this connection alleges that the plaintiff's position and contention with respect to hearing before the defendant Commissioner of Insurance in relation to the order of the Commissioner of May 18, 1940 and the order of the Commissioner of May 5, 1941 (which later order is referred to in paragraph 6 of the complaint) was that the plaintiff did not want any hearing before the Commissioner thereon.

Defendant alleges that the circumstances relating to the order of May 18, 1940 were that the defendant had the plaintiff's application under advisement but that the defendant, as Commissioner of Insurance, had taken no official action with respect to plaintiff's application for renewal of its said license and those of its agents when, on May 11, the defendant received a letter from the Director of Insurance of the state of Illinois inquiring as to the status of the plaintiff company in the state of Wisconsin and suggesting to the defendant that said Director would like to receive notice of the defendant's proposed action in relation to the plaintiff's application for renewal of its license to do busi-

[fol. 105] ness in the state of Wisconsin in advance of defendant's official action in respect thereto. That in response to said letter the defendant duly notified the Director of Insurance as to the defendant's official action in respect to said application by a letter dated May 18, 1940 and by forwarding with said letter a copy of the defendant's findings and decision in said matter; that said findings and decision set forth in detail the various statutes with respect to which the plaintiff company's method and plan were at variance and not in compliance as well as why the plaintiff company's methods and practices in the conduct of its business were not such as to safeguard the interests of its policy holders and the people of the state; that at the same time notice of said decision and findings were transmitted to Ekern & Meyers at Chicago, attorneys for the plaintiff company, who had represented it in obtaining the original license and in the application for renewal thereof. That in defendant's letter to the Director of Insurance of the state of Illinois the defendant stated that if he received a statement from the company that it was withdrawing from the state within ten days it would not be necessary for the defendant to serve the said findings and decision upon the company and have the matter acted upon by the courts; that before the ten days expired the plaintiff company, without notifying the defendant that it intended to do so and without applying for any rehearing commenced the action in the United States District Court for the Western District of Wisconsin, referred to in paragraph 5 of the bill of complaint. Alleges that in that said action and as an ex parte matter, the District Court of the United States issued a temporary restraining order pending a hearing [fol. 106] upon the company's application for a temporary injunction; that the defendant was duly notified of the date for hearing upon said company's application for temporary injunction in the District Court, the said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (sec. 380, U. S. C. A., Title 28).

3. Admits paragraph 5 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendants order and decision of May 18, 1940" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay

order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendants findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

Defendant alleges that he was unable to bring his action, instituted in the Circuit Court for Dane County, on for trial and disposition prior to the expiration of the 1941 license year due to the plaintiff company's requesting adjournments or continuances from time to time, some of which the defendant, upon request, agreed to but the last one of which the defendant opposed and that the continuance granted by the Court with respect thereto was over the defendan's objection thereto.

[fol. 107] 4. Admits the allegations of paragraph 6 except the allegation that plaintiff complied with all conditions and requirements to entitle it and its agents to licenses, and denies same.

5. Admits the allegations of paragraph 7 and alleges that the plaintiff company in its action in the Federal District Court aforesaid again pursued the same remedy in the Federal Court and obtained, as an ex parte matter, a temporary restraining order from said Court pending a hearing upon the company's application for a temporary injunction; that the defendant was again duly notified of the date of hearing upon the company's application for a temporary injunction, said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (sec. 380, U. S. C. A., Tit. 28).

6. Admits the allegations of paragraph 8 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce

against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

[fol. 108] 7. Admits the allegations of paragraphs 9, 10 and 11 except the allegation in paragraph 10 that the demurrer was "not on the merits", denies said allegation and alleges that the demurrer fully presented the case upon its merits.

8. Admits that on or about the 15th day of April, 1942, the plaintiff company attempted to file new rates and policy forms with the defendant and admits upon information and belief that as of April 27, 1942 the plaintiff company abandoned the use of its membership fee plan in the state of Wisconsin; admits upon information and belief that plaintiff on and after the 27th day of April, 1942 adopted and put in force in Wisconsin a new policy and rate plan based on the level premium plan for both new and renewal rates. Admits that Ex. 2, attached to the complaint, is a copy of the schedule of rates and policy form attempted to be filed with the defendant. Alleges that the plaintiff was informed at the time of the attempted filing that the defendant could not accept same; that plaintiff's unearned premium reserves were not and would not be by the proposed change, within the requirements of the Wisconsin Statutes and that such proposed filing was not in compliance with the Supreme Court decisions referred to in paragraph 12 of the complaint in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the state of Wisconsin as construed by said Court in said decisions. Denies that said attempted filing or that the putting into operation of the new policy and rates above referred to was in full compliance with the Statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department or with the construction of the Wisconsin Statutes in the Supreme [fol. 109] Court opinions hereinbefore referred to and in this connection alleges that said attempted filing and the

putting into force said policy and rates in the state of Wisconsin and the attempting of the plaintiff to do business thereunder was not in compliance with the said Supreme Court decisions but in defiance thereof and for the reason that the plaintiff's unearned premium reserves do not meet the requirements of the Wisconsin Statutes as those requirements were construed in said opinions. Denies that the plaintiff's methods and practices in the conduct of its business are such as to safeguard the interests of its policy holders and the people of the state. In this latter connection the defendant alleges that the plaintiff has always justified its life membership fee plan of writing insurance in that such plan gives the insured a valuable right to insure in the company pursuant to the terms of the policy provision set forth on page 12 of the complaint. Alleges that the plaintiff company claimed the right to be valuable in that the insured had a contract right to purchase insurance with the plaintiff company once the membership fee was paid, at its reduced rates, which rates were reduced because of payment of the life membership fee. The plaintiff compaay in its attempted filings of April 15, 1942 and its subsequent putting into operation a new level premium plan in the state of Wisconsin constitutes a breach and a complete abandonment by the plaintiff of the obligation assumed by plaintiff in the policy contract clause, hereinbefore referred to, in respect to all policy holders who, since plaintiff commenced doing business in the state, have paid [fol. 110] to the plaintiff life membership fees for the claimed valuable right referred to.

Defendant alleges that plaintiff has collected from policy holders in the state of Wisconsin, while it was unlawfully writing insurance upon a life membership fee plan, $137,737.50 in membership fees up to January 1, 1942, all of which money lawfully and in equity and good conscience belongs to and should be returned to said insureds as the plaintiff company cannot lawfully perform its contract obligation with them and has, by the new schedule of rates, abandoned its contract obligation with its said insureds. The defendant alleges that even if plaintiff's unearned premium reserves did meet the requirements of Wisconsin Statutes he would refuse to license the plaintiff company until it has returned to its insureds the life membership fees extracted from them and with respect to which it cannot give anything in return.

Admits that plaintiff, on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. Admits that the level premium plan or similar level premium plans now used by the plaintiff in Wisconsin are plans used by most of the automobile insurance companies in the state of Wisconsin and that level premium plans are approved by the defendant for use in Wisconsin.

9. Denies all allegations of paragraph 13 except those that plaintiff has paid all required and lawful fees, charges and taxes due the state of Wisconsin as a condition for doing business and admits same.

[fol. 111] 10. Admits the commencement by plaintiff of the action in the United States District Court for the Western District of Wisconsin set forth in paragraph 14. Denies that defendant's refusal to issue the licenses was arbitrary or capricious. Admits the pendency of plaintiff's action commenced in the Federal District Court for the Western District of Wisconsin and that the ex parte temporary restraining order which plaintiff procured in said action was continued in full force and effect until such reasonable time as it would take plaintiff to commence the instant action in the Circuit Court for Dane County. Admits that such procedure was agreed upon at the suggestion of the judge of the Federal District Court for the Western District of Wisconsin but denies that it was the contention by counsel for defendant that the issues raised by plaintiff's action in said Federal District Court involved a construction of the powers and duties of the defendant which had not been completely applied or construed by the Wisconsin Supreme Court in the decisions referred to, and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court, and in this connection alleges that the defendant took the position in the said Federal District Court that the decisions of the Wisconsin Supreme Court referred to had completely disposed of the issue which plaintiff sought to raise in said action and which plaintiff seeks to raise in this action and had disposed of said issue contrary and adversely to the plaintiff's position in that action and that defendant considered there was such little merit to the plaintiff's position

that he proposed to dispose of the matter by motion for summary judgment in the two prior actions which defendant instituted in the Circuit Court for Dane County and re- [fol. 112] ferred to in paragraphs 5 and 8 of the complaint herein, but that if the foregoing position were not true and there did remain any issue of law not settled by said decisions, then it would follow that the plaintiff in its action in the Federal District Court was asserting rights in said court under Wisconsin statutes which called for official action and under circumstances where that official's duty had not as yet been determined by the highest court of the state and that for a Federal Court to attempt to forecast that duty would be an abuse of discretion and reversible error under the doctrine of the federal cases cited and that in either event the complaint set forth no cause of action with respect to which the Federal Court could or should proceed.

11. Admits upon information and belief paragraph 15, except the allegation that the convention examination and reports found plaintiff's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus in full and complete compliance in every particular and detail with all the provisions of the applicable laws, rules and regulations of the states, district and country in which the plaintiff operates and with respect to said allegation denies same and alleges that the convention examinations and reports do not purport to find or determine whether the plaintiff company or any other company operates in full and complete compliance in every particular and detail with all the provisions of the applicable laws of the various states, districts or countries in which a company operates and does business.

12. Admits the allegations of paragraph 16 of the complaint except the allegation that the plaintiff company is in sound financial condition and in this connection alleges that [fol. 113] the plaintiff's life membership fee plan and method of operation which it uses in 38 out of 42 states, districts and countries in which it does business is such as to make it impossible to determine the plaintiff's surplus after setting aside unearned premium reserves as required by Wisconsin law and such as to make it impossible to compute and set aside the required statutory unearned premium re-

serves and such as to make it impossible for the plaintiff to meet the solvency requirements of the Wisconsin unearned premium reserve law.

13. Denies upon information and belief that counsel for defendant, upon defendant's motion to dismiss plaintiff's complaint in the Federal District Court, purported to make a comprehensive statement as to all of defendant's major objections and reasons for refusal to grant the plaintiff and its agents licenses and in this connection alleges that there are major objections to licensing the plaintiff and its agents, all of which have been asserted by the defendant at various stages of these proceedings, are matters of record therein and fully and completely known to the plaintiff, in addition to those set forth herein and which defendant is not asserting at the present time because of his belief that there is no merit to the present action for reasons herein set forth.

Defendant further alleges upon information and belief that the statement in paragraph 17 of the complaint "counsel for the defendant in open court, stated, that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country" is not an accurate statement with respect to counsel's statement and alleges that it is not the position of the defendant [fol. 114] with respect to defendant's objection to plaintiff's life membership fee plan of operation used by the plaintiff in 38 out of the 42 states, districts and countries in which it does business and in this connection alleges that the defendant's objection to the life membership fee plan used in such states is not grounded upon the fact that the plaintiff uses such plan in said states or upon any question as to whether said plan is lawful or unlawful in said states, but that the plan itself, as used in said states is such as to make it impossible for plaintiff to comply with the unearned premium reserve laws and the solvency requirements in relation thereto with respect to foreign mutuals doing business in this state.

Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the second full paragraph of paragraph 17 of the complaint, but for purposes of this answer admits same. Admits that the plaintiff's life membership fee plan and its method of operation

thereunder in all states except Texas, Louisiana, Arizona and Wisconsin, since April 27, 1942, are substantially as set forth in paragraph 17 of the complaint, but alleges that for all purposes of the Wisconsin Statutes the plaintiff's life membership fee is "premium" and as such is not earned at once and cannot be treated as earned at once, and alleges that when the plaintiff company does business on the life membership fee plan as it did in Wisconsin until April 27, 1942 and as it does in all states except as above noted, the plaintiff company forecloses any possibility of its maintaining the unearned premium reserves required by Wisconsin law and required of all insurance companies doing business in Wisconsin, foreign and domestic.

[fol. 115] Admits that the contractual agreement between the company and its policy holders, as set forth in the policy with respect to life membership fees is as alleged in the complaint, paragraph 17, sub-paragraph 4, page 12, and complaint, paragraph 17, sub-paragraph 4, page 12, and that the by-law of the plaintiff company with respect to membership fees is as alleged in the complaint, paragraph 17, sub-paragraph 5, bottom of page 12 and top of page 13 of the complaint. Defendant has no knowledge or information sufficient to form a belief as to whether the purpose of the membership fee is as set forth in paragraph 17 of the complaint, sub-paragraph 6, page 13, but for purposes of this pleading admits same. Admits that the plaintiff company treats the life membership fee as one which by the contract is earned at once and as one which is not returnable and in this connection alleges that such is the plaintiff company's practice in all states in which it operates and uses the life membership fee plan and alleges that as a fee treated as earned at once the plaintiff company sets up no unearned premium reserves at all with respect to such life membership fee. Admits that the life membership fee plan has been continuously used by the plaintiff company since the organization thereof.

Defendant has no knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 17, sub-paragraph 7, page 13 of the complaint, but for purposes of this pleading admits same. Admits that the allegations contained in paragraph 17, sub-paragraph 8, page 13 and top of page 14 correctly state the company's practices with respect to its plan and method of operation under the life membership fee plan.

Admits that the "premiums" charged by the plaintiff (premiums designated as such in the policy) under its life [fol. 116] membership fee plan of operation are from 20 to 35 per cent less than the so-called conference rates, depending upon the particular class of insurance carried. Admits that the several factors (denominated (1), (2), (3), (4), (5), (6) and (7)), sub-paragraph 9 of paragraph 17 of the complaint, pages 14 and 15, are factors which the plaintiff uses in its system of writing insurance and that the method of writing insurance used by the plaintiff company is as set forth in said sub-paragraphs. Admits that said methods have economy advantages and in this connection alleges that such economy factors have both advantages and disadvantages. Admits that the plaintiff has extended and operates under the life membership fee plan in 38 states of the union and Canada; admits that said plan is not now used in Wisconsin, but alleges that it was used in Wisconsin continuously until April 27, 1942. Denies that the life membership fee plan has proved very successful and satisfactory to the policy holders of the plaintiff companies. Defendant has no knowledge or information sufficient to form a belief as to whether the life membership fee plan has been objected to as in violation of the laws or as being unsound, discriminatory or unreasonable in other states wherein plaintiff now operates on this plan but for purposes of this pleading admits the plaintiff's allegation that it has not been so objected to in said other states. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last full paragraph (sub-paragraph 11 of paragraph 17, page 15 and top of page 16 of the complaint) and therefore neither admits nor denies same, but for purposes of this pleading admits that so far as known to defendant plaintiff's life membership fee plan and its [fol. 117] methods and practices thereunder are in compliance with the laws of said states where it is permitted to use said plan, but in this connection alleges that such plan is one which may upon superficial analysis receive adminstrative approval as was the case when Commissioner Mortensen licensed the plaintiff company in 1939 but is one which is vulnerable when subjected to judicial scrutiny and attack as was the case in Wisconsin, and further alleges upon information and belief that the plan has been subjected

to judicial scrutiny and attack in few, if any, of the states, districts or countries in which the plaintiff company does business. Denies that plaintiff's assets and reserves are in compliance with the laws of the state of Wisconsin or that they are such as to safeguard the interests of plaintiff's policy holders and the people of this state.

14. Admits that the defendant refused to renew plaintiff's license to do business in Wisconsin for the period ending May 1, 1943, and to renew plaintiff's agents' licenses, but denies that said refusal was arbitrary, capricious or unreasonable. Denies that it was the ministerial duty of the defendant to issue any such licenses and in this connection, for reasons hereinbefore set forth, alleges that it was the plain duty of the defendant to refuse the renewal of such licenses.

15. Denies the allegations of paragraph 19 of said complaint and in this connection alleges that the plaintiff company has never lawfully conducted its business in Wisconsin and is not now doing so and that the plaintiff company never has been entitled to a license to do business in the state of Wisconsin and is not now entitled to such license or licenses.

[fol. 118] 16. Admits that the plaintiff now has in force in the state of Wisconsin approximately 23,000 risks and that plaintiff's annual premium income from such risks is in excess of $400,000 and rapidly growing; admits that plaintiff has established and now maintains in Wisconsin an administrative office and agencies and a large sales force and staff with a loss adjustment bureau; admits that plaintiff now has in Wisconsin a force of approximately 500 agents and that the plaintiff has invested, in organizing and building up such establishment, in excess of $25,000, but in this connection alleges that the plaintiff commenced doing business in this state by virtue of the license issued to plaintiff by Commissioner Mortensen on July 13, 1939, and which said license expired by its own terms on May 1, 1940; that the plaintiff knew at the time that it entered the state and commenced to build up its organization that it was extremely doubtful whether the plaintiff's method and plan of operation complied with the laws of the state of Wisconsin and whether such method and plan could be brought in compliance with the laws of said state. Alleges that when

plaintiff's license expired it had only some 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff; that the plaintiff proceeded promptly with its first action in the Federal Court to tie the defendant's hands so it could go forward building up its organization so that it could continue to write its unlawful insurance. Alleges that whatever damage the plaintiff will suffer by reason of the defendant's refusal to license the plaintiff to do business in the state is damnum absque injuria and damage which the plaintiff has brought upon itself by its own action in the premises in its various at- [fol. 119] tempts to thwart and defy the laws of the state and which said laws the plaintiff still seeks to set at naught, thwart and defy in the instant action.

The defendant admits that he intends to enforce the insurance laws of the state against the plaintiff, but denies that he will invoke upon the plaintiff large, unjust, unreasonable or irreparable losses and damages for which plaintiff has no remedy at law that is just or adequate and denies that the writ of injunction is the only writ that can save and preserve to the plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner or until the defendant has been compelled to renew plaintiff's license for the license year ending May 1, 1943 at the end of this litigation. Defendant admits that prior to the first day of May, 1942 the plaintiff seasonably made application for a license for the license year ending May 1, 1943 but denies that the plaintiff complied with all rules and regulations of the department or with all laws of the state of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to a license for said license period. The defendant admits that the plaintiff professes to bring this action for the purpose set forth in paragraph 20 of the complaint, but in this connection alleges that the issue which plaintiff seeks to raise in the instant action has already been determined adversely to the plaintiff by the decisions of the Wisconsin Supreme Court, hereinbefore referred to, and that the plaintiff's action is wholly without merit.

17. The defendant admits that as Commissioner of Insurance he has only such powers and duties as are delegated to him by virtue of the statutes of the state of Wisconsin but [fol. 120] denies that his refusal to renew plaintiff's license

for the period May 1, 1942 to May 1, 1943 was or is erroneous, arbitrary, capricious or without warrant in law or in violation of any ministerial duty imposed by statute upon the defendant.

[fol. 121] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT—Filed Sept. 17, 1942

To: R. M. Rieser, Herbert H. Naujoks, Rieser & Mathys, Ekern & Meyers, Attorneys for Plaintiff.

You will please take notice that upon affidavits of Morvin Duel, defendant in the above entitled action, and John Lange, attached hereto, the records and documents referred to therein, and upon all the records, files and proceedings had herein, the defendant will move the Court for summary judgment pursuant to the provisions of sec. 270.635, Wisconsin Statutes, at a regular term thereof to be held at the Court House, Branch 2 of said Court, Honorable August C. Hoppmann, Circuit Judge presiding, on the 29th day of June, 1942, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 6th day of June, 1942.

John E. Martin, Attorney General; N. S. Boardman, Assistant Attorney General, Attorneys for Defendant Commissioner of Insurance.

Received copies of the within Notice of Motion admitted this 6 day of June, 1942.

R. M. Rieser, Herbert Naujoks, Attorney for ——.

[fol. 122] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF MORVIN DUEL—Filed Sept. 17, 1942

MORVIN DUEL, being first duly sworn on oath deposes and says that he is the Commissioner of Insurance of the State

of Wisconsin and the defendant in the above entitled action and that he believes that the said action has no merit.

That the defendant submits herewith, as part of this affidavit, the printed case and briefs in Cases No. 138 and No. 139, August, 1941 Term of the Supreme Court of the State of Wisconsin in an action entitled:

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Defendant,

the said briefs consisting of the defendant-appellant's original brief, the plaintiff-respondent's original brief, the defendant-appellant's reply brief, the plaintiff-respondent's reply to reply brief, the defendant-appellant's brief in support of motion for rehearing, the plaintiff-respondent's brief in opposition to motion for rehearing, the reply brief of the defendant-appellant in support of motion for rehearing and the plaintiff-respondent's reply to the reply brief of defendant-appellant in support of motion for rehearing.

[fol. 123] That the exhibits printed in the printed case, above referred to, are copies of public records or documents on file either with this court, the State Department of Insurance, or the office of the Attorney General.

That the letter of R. C. Mead, dated April 14, 1942 (Ex. D) attached to the affidavit of John Lange, and the attempted filings made at that time, constitute all of the information conveyed by plaintiff to affiant then or since with respect to any proposed changes or of what the plaintiff company proposed to do in relation to or supplemental to said proposed changes.

(Signed Morvin Duel.

Subscribed and sworn to before me this 6th day of June, 1942.

Inga B. Williamson, Notary Public, Dane County, Wisconsin. (Seal.)

My commission expires May 20, 1945.

[fol. 124] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF JOHN LANGE—Filed Sept. 17, 1942

JOHN LANGE, being first duly sworn, on oath deposes and says that he is Chief Actuary of the Insurance Department of the State of Wisconsin, and has occupied such position since April 1, 1930, and that from January, 1920 to April 1, 1930 he occupied the position of Assistant Actuary in said department; that in those positions it has been his duty to examine into the financial condition and affairs of companies licensed in the state and those applying for a license to be admitted to the state:

That all insurance companies applying for license or re-license are required to file a financial statement each year showing their financial condition at the end of the preceding calendar year, upon forms prescribed and furnished by the Insurance Commissioner, a copy of which said form is attached hereto marked Exhibit A and made a part hereof; that all domestic insurance companies are required to file like statements; that attached hereto and marked Exhibit B and made a part hereof is the financial statement of the plaintiff company filed with the Department, showing its financial condition as of December 31, 1941:

That, as shown by line 25 on said exhibits, page 5 and on page 7, companies are required to report the unearned premium reserve computed upon a country-wide basis, that is, all states, territories, districts and countries in which the said company does business or has business in force; that companies in reporting the unearned premium reserve are [fol. 125] not required or permitted to report said reserve separately by the various states, districts, territories or countries in which they do business or have insurance in force, but are required to set up one unearned premium reserve for all business transacted country-wide, as above set forth; that the foregoing is the same method and requirement of reporting unearned premium reserve adopted by the National Association of Insurance Commissioners in their Convention Reports; that an unearned premium reserve so computed must be set aside by each company

reporting before its surplus can be determined; that the one unearned premium reserve so set aside and so computed is the reserve which the commissioner of insurance and the department actuaries must examine and which they do uniformly examine to determine whether a particular company's unearned premium reserve meets the minimum requirements of the Wisconsin Statutes; that the foregoing has been true to affiant's knowledge ever since his employment by the Department in 1920, and that same was true and the existing practice at the time that affiant was first employed by the Department;

That, as shown by the annual financial statements of the plaintiff, which are public records and on file with the Wisconsin Department of Insurance, the plaintiff company is licensed to transact business in forty-one states, districts and provinces, exclusive of Wisconsin; that said records also show that the plaintiff uses its life membership fee plan of writing insurance in thirty-eight of said forty-one states, districts and provinces, exclusive of Wisconsin; that said records also show that the plaintiff does not consider or treat its life membership fees collected by virtue of said plan as "premium", and that the plaintiff sets up no unearned premium reserve whatsoever with respect to any life membership fees collected by it; that said records further show that the plaintiff treats its life membership fee as something entirely distinct and separate from premium in setting up the unearned premium reserve;

[fol. 126] That said records and other records in the Department show that the plaintiff used the life membership fee plan in Wisconsin continuously from July, 1939, when it was licensed by Commissioner Mortensen, to April 27, 1942; that said records further show the net premiums country-wide collected by the plaintiff company for each of the years 1929 to 1941, inclusive, including Wisconsin for the years 1939, 1940 and 1941, (premium as defined in the company's contract of insurance), to be as set forth in column 1, Exhibit C attached hereto and made a part hereof, and the life membership fees, countrywide, including Wisconsin for the years 1939, 1940 and 1941, collected in addition thereto for each of the years during the same period to be as shown by column 2 of said Exhibit; that column 3 of said Exhibit gives the same information with respect to net premiums collected in Wisconsin for

each of the years 1939, 1940, and 1941, and that column 4 of said Exhibit gives the same information with respect to membership fees collected in Wisconsin, for each of the years during the same period, all of which said information appears from the plaintiff company's annual statements and records on file in the Wisconsin Department of Insurance;

That Exhibit B, line 25, page 5 and page 7, includes no unearned premium reserve on the $14,532,744.91 of life membership fees collected and shown on Exhibit C, column 2, and no unearned premium reserve on life membership fees collected during the year 1928 and prior thereto, approximating an additional $450,000.00 of membership fees;

That attached hereto, made a part hereof and marked Ex. D is a copy of the letter of the plaintiff company, dated April 14, 1942, left with affiant on or about the 15th day of April, 1942, at the time that the plaintiff company attempted to file its level premium policy form and new rates with the State Department of Insurance; that the informa-
[fol. 127] tion contained in said letter and the forms attempted to be filed therewith constitute all the information which the plaintiff company furnished affiant then or since with respect to any proposed changes or of what the paintiff company proposed to do in relation to or supplemental to said proposed changes.

That at the time of said deliveries affiant advised the said R. C. Mead, in person, on behalf of the Department of Insurance, that the filings could not be accepted; that the plaintiff's unearned premium reserves were not and would not be by the proposed change within the requirements of the Wisconsin Statutes and that the Department could not agree with the third paragraph of said letter (Ex. D) which is to the effect that plaintiff's new proposals constituted a compliance with the Supreme Court decisions, referred to in paragraph 12 of the complaint, in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the State of Wisconsin as construed by the Wisconsin Supreme Court in the decisions referred to.

That attached hereto, made a part hereof and marked Ex. E is one of the company's schedules of rates filed with the Department, which said schedule was in use by the plaintiff company from June, 1939 to April 27, 1942, as shown by the records of the Department.

Affiant further states that the plaintiff in its 1940 Federal District Court action, referred to in paragraph 5 of the bill of complaint in this action, alleged in substance, paragraph 5 of its bill of complaint, that at that time the plaintiff had 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff, and that arrangements had been made with approximately 40 additional individuals to be licensed as local agents of the plaintiff. That said original bill of complaint is on file [fol. 128] in said Federal District Court and the copy served upon the Commissioner is on file with the Department of Insurance.

John Lange.

Subscribed and sworn to before me this 6th day of June, 1942. Inga B. Williamson, Notary Public, Dane County, Wisconsin. My commission expires May 20, 1945.

[fol. 129]

EXHIBIT "C" TO AFFIDAVIT

Net Premiums Gross Less Return Premiums:

	Col. 1 Net Premiums Country-Wide	Col. 2 Membership Fees Country-Wide	Col. 3 Net Premiums Wisconsin	Col. 4 Membership Fees Wisconsin
1941	$22,519,830 49	$2,574,985 82	$531,215 67	$98,987 50
1940	16,553,771 38	1,598,488 41	92,619 88	38,558 00
1939	14,977,793 29	1,181,354 91	7,867 00	192 00
1938	12,162,570 76	911,458 50	—	—
1937	10,960,757 80	952,909 26	—	—
1936	9,448,240 39	753,272 45	—	—
1935	8,126,894 94	769,871 39	—	—
1934	*7,734,741 00	755,531 03	—	—
1933	*6,613,466 00	702,046 81	—	—
1932	5,768,425 03	613,255 58	—	—
1931	6,220,919 17	904,286 53	—	—
1930	5,684,109 73	1,281,041 28	—	—
1929	4,469,316 33	1,534,242 94	—	—
	$130,340,836 31	$14,532,744 91	$631,702 55	$137,737 50

* These are net figures after deducting reinsurance ceded and taken from Best's insurance reports rather than from annual statements.

[fol. 130] EXHIBIT "D" TO AFFIDAVIT

State Farm Mutual Automobile Insurance Company

Bloomington, Illinois

April 14, 1942.

Honorable Morvin Duel, Commissioner of Insurance, State of Wisconsin, Madison, Wisconsin.

MY DEAR COMMISSIONER:

In the light of recent decision of the Supreme Court in the Case of Morvin Duel v. State Farm Mutual Automobile Insurance Company, we are herewith enclosing for filing, two copies of our revised Wisconsin automobile insurance policy (Form A9040.4), and two copies of a revised manual containing premium schedules for the various forms of insurance coverages on automobiles which we propose to make effective in Wisconsin as of 12:01, A. M., April 27, 1942.

It will be noted that we have eliminated the policy, in the manual and in the premium schedules, any reference to membership fees and the semi-annual premiums are on a level premium basis, alike for both new and renewal policies.

Having complied with the decision of the Supreme Court referred to, request is respectfully made for the renewal of the license of the State Farm Mutual Automobile Insurance Company and its agents in Wisconsin.

Very truly yours, (Signed) R. C. Mead, Actuary.

RCM e.
encls.

[fol. 131] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF PAUL F. JONES—Filed October 2, 1942

STATE OF ILLINOIS,
Cook County, ss:

Paul F. Jones, being first duly sworn on oath, deposes and says as follows:

That he is the duly qualified and acting Director of Insurance of the State of Illinois with his principal offices in the City of Springfield, Sangamon County, Illinois; that he was appointed as Director of Insurance of Illinois on January 20, 1940, and has since continuously occupied and filled the duties of said office;

That in addition to others, his duties include the regulation and supervision of both domestic, foreign and alien insurance companies, in accordance with the statutes; that he is familiar with the affairs, condition and history of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois (hereinafter referred to as "the Company"), which was incorporated in the year 1922 in the [fol. 132] State of Illinois and licensed in said year by the State of Illinois to do all forms of automobile insurance business; that the said Company now lawfully operates and does business in forty states of the United States, in the District of Columbia, and in the Dominion of Canada; that to the best of affiant's information and belief, the license of the said Company has never been suspended or revoked in any state nor has renewal thereof been refused in any state at any time except in the State of Wisconsin; that the said Company is one of the largest exclusive writers of automobile insurance business.

That the annual statements of the Company have been filed on uniform forms or blanks prescribed by the National Association of Insurance Commissioners; that the financial condition of the Company is shown by such annual statements of the Company on file with the Department of Insurance of the State of Illinois and copies of which are on file with the Commissioner of Insurance of Wisconsin and

with the Insurance Departments of the several states, district and countries in which the said Company operates; that on the basis of said Company's financial statements, it is in a sound financial condition and has ample reserves to meet liabilities of all kinds and that the Company's surplus over all liabilities as reflected by its statement of December 31, 1941, was $6,197,429.62 (this was in addition to a general or contingency reserve fund of $3,600,000); that the Company's annual sworn statement as of December 31, 1941, showed total admitted assets of $25,510,220.50, and that the Company's total liabilities as of December 31, 1941, were $19,312,790.88, which included the general or contingency fund of $3,000,000.00;

That the Company was first examined by the Illinois Insurance Department as of December 31, 1924, and that the next examination of the Company was a Convention Examination made by representatives of the Illinois, Kansas and [fol. 133] Michigan Insurance Departments as of June 30, 1926; that convention examinations are thorough-going inquiries into the income, disbursements, assets, liabilities, including setting up of prescribed unearned premium and loss reserves, treatment by the Company of its policyholders, compliance with the laws, method of doing business and all other matters deemed important or material in determining the true financial and general condition and standing of an insurance company; that such examinations are made jointly by two or more insurance departments of states in which the Company is licensed to do business; that thereafter the said Company was subjected to six additional convention examinations by the Insurance Departments of several states and that such examinations were made as of December 31, 1927, July 31, 1929, January 30, 1931, June 30, 1933, June 30, 1936, and December 31, 1939; that each such examination of the Company hereinabove referred to was favorable; that continuously since its organization, the Company has operated in most states on the so-called "membership fee plan"; that under this plan each applicant for automobile insurance is required by the By-Laws and regulations of the Company to pay a separate membership fee for each general class or kind of insurance that he then or thereafter may wish to purchase. The membership fee does not purchase insurance and is no part of the premium for insurance which is a separate charge. By the terms of the policy contract with the policyholder, the member-

ship fee is not returnable but entitled the named insured to insure one automobile for the coverages for which the applicable premiums are paid so long as the Company continues to write the coverages requested and the insured remains a desirable risk.

The purpose of the membership fee is to defray the expense of securing the new member and the expense of inspection and determining whether the applicant is eligible [fol. 134] to belong to a carefully selected group of automobile owners entitled to purchase and renew automobile insurance in the Company. Under this plan, each applicant, as a condition of admission to membership, himself bears the entire cost of establishing his eligibility to insure in the Company and this relieves the existing policyholders of this expense and thus reduces their cost of insurance. The premiums vary as to coverage, type of car and territory where located, and are collected separate from and in addition to the applicable membership fees. The first premium paid provides insurance for an original term of six months and this insurance may be renewed automatically under the same policy on the same car for such additional periods of six months each as the required net renewal premium is paid by the insured on or before the expiration of the then current term of insurance.

That under the laws of the State of Illinois and under the contract between the Company and the policyholder, the membership fees collected in Illinois are not a part of the premium and hence no unearned premium reserve is required to be set up against such membership fees in the State of Illinois nor in any other state in which the Company does business except as otherwise held by the Wisconsin Supreme Court in the case of *Duel v. State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, in the State Wisconsin.

That unearned premium reserve liability of the Company was and is computed upon the premiums in force as is shown in each of the annual statements prepared by the Company and filed with the various Insurance Departments of the states wherein the Company does business, and in no instance was or is any item of membership fees included or required to be included in the computation of the unearned premium reserve liability of the Company; that the annual [fol. 135] statements prepared by the Company and filed

with the various Insurance Departments of the States wherein the Company does business purports to reflect the true financial condition and position of the said Company; that the Company's method of computing and setting up unearned premium reserves, as is shown by the annual statements filed by the said Company with the various Insurance Departments, is in full compliance with the laws of the State of Illinois and the applicable rules and regulations of the State of Illinois.

Paul F. Jones.

Subscribed and sworn to before me this 1st day of October, 1942. Marie Field, Notary Public, Cook County, Illinois. My Commission expires 19th day of March, 1946. (Seal.)

[fol.136] [File endorsement omitted

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST—Filed October 2, 1942

ADLAI H. RUST, being first duly sworn on oath deposes and says as follows:

That he is a resident of Bloomington, Illinois; that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, (hereinafter for convenience referred to as "the Company") and has been connected with the said company since its inception; that he now holds the offices of Executive Vice-President and Treasurer and has held both of these offices for several years; that he is a member of the board of directors of the Company and of the executive and investment committees thereof; that among other of his duties for several years last past, affiant has supervised the dealings of the Company with the various insurance departments of the several states and that the financial operations of the said Company are under his general supervision and control and that he is fully acquainted with the finances of the Company, its annual statements, the preparation and items thereof, and its methods and practices of doing business.

That the State Farm Mutual Automobile Insurance Company was incorporated in the year 1922 in the state of Illinois; that the said Company writes only automobile insurance and it commenced to do business on June 7, 1922 and confined its business to the state of Illinois until the [fol. 137] year 1925 when it was licensed to do business in the State of Indiana; that during the period from 1925 to date, the Company was licensed and now lawfully does business in the following states: (The figures after the state show the year when the Company was first licensed in each state.) Alabama, 1932; Arizona, 1929; Arkansas, 1931; California, 1928; Colorado, 1927; Delaware, 1933; District of Columbia, 1934; Dominion of Canada and Province of Ontario, 1938; Florida, 1934; Georgia, 1932; Idaho, 1929; Iowa, 1927; Kansas, 1927; Kentucky, 1927; Louisiana, 1935; Maryland, 1933; Michigan, 1926; Minnesota, 1926; Mississippi, 1928; Missouri, 1925; Montana, 1928; Nebraska, 1927; Nevada, 1928; New Jersey, 1940; New Mexico, 1929; North Carolina, 1930; (Company later withdrew, but in 1939 again applied for a license and was relicensed); North Dakota, 1928; Oklahoma, 1930; Oregon, 1930; Pennsylvania, 1937; South Carolina, 1932; South Dakota, 1925; Tennessee, 1926; Texas, 1928; Utah, 1928; Virginia, 1930; Washington, 1928; West Virginia, 1929; Wisconsin, 1939; Wyoming, 1929. That the license of the said Company has never been revoked in any state nor has renewal thereof been refused in any state at any time except in the state of Wisconsin. The Company was first licensed in the state of Wisconsin on July 13, 1939.

The Company is the largest exclusive writer of automobile business in the world and writes more automobile insurance than any other casualty company. That it transacts only an automobile insurance business covering all of the hazards of automobile ownership and operation and it limits its business to selected preferred risk drivers.

That the financial condition of the Company is as shown by the annual statements of the Company, copies of which are on file with the Commissioner of Insurance of Wisconsin and with the insurance Department of all states in which it operates.

That the Company's annual sworn statements of December 31, 1941, showed total admitted assets of $25,510,220.50

and that the Company's total liabilities as of December 31, [fol. 138] 1941 were $19,312,790.88, which included a general or contingent reserve fund of $3,000,000. The Company's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000) was $6,197,429.62. That the present contingent reserve in the amount of $3,000,000 was created by the Board of Directors of the Company by a resolution duly adopted on December 31, 1941, which is in words and figures as follows:

> "Be Is Resolved, that in lieu of the Contingency Reserve heretofore maintained by this Company in the sum of $2,750,000, a Contingent Reserve be and the same is hereby established in the sum of $3,000,000, and that appropriate entries to that effect be made upon the books and the records of this Company and in the financial statement for the year 1941 when the same is filed with the various Insurance Departments, and that said Contingent Reserve be and the same is hereby created and designated for any and all possible liabilities of the Company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the Company or its policyholders."

That the contingent reserves shown in previous statements were maintained under similar previous resolution of the Board of Directors or the Executive Committee thereof.

That attached to this affidavit marked "Exhibit A" and by reference incorporated herein as a part hereof, is a tabulation showing the income and disbursements for the year, and admitted assets, Total Reserves excluding the Contingency Reserve, the Contingency Reserve and Surplus of the Company at the end of the year, for the years ending December 31, 1929 to 1941 inclusive.

That at the time of the application for admission of the Company to each of the states above listed and as of December 31st of each year thereafter, and in some states as of June 30th of each year thereafter, a sworn financial statement has been filed by the Company with the appropriate department of such state.

That the Company was first examined by the Illinois Department as of December 31, 1924, and that the next

examination of the Company was made by representatives of the Illinois, Kansas and Michigan Departments as of [fol. 139] June 30, 1926. That six Convention Examinations of the Company have been made, those examinations having been made as of the dates and conducted by the Insurance Departments of the states listed below:

Examination as of	*States Participating*
December 31, 1927	Illinois, Minnesota, Kansas, Missouri, Texas, South Dakota and Indiana
July 31, 1929	Illinois, Minnesota and South Dakota
January 30, 1931	Illinois, Kansas, Nebraska, Washington, Texas and West Virginia
June 30, 1933	Illinois, Missouri, Minnesota, Oklahoma and Virginia
June 30, 1936	Illinois, Texas, Alabama, Indiana, Pennsylvania and Louisiana
December 31, 1939	Illinois, Arizona, Oklahoma and Kentucky

That copies of said reports of examination when completed and certified, were filed with the Insurance Departments of each state in which the Company was then licensed to do business; that such reports, together with the annual reports of the Company were thereafter used and accepted by each of such states in issuing or reissuing licenses to said Company in the respective states.

That at all times since the inception of the Company, in all policies issued on the membership plan and in all states in which said plan was used, the membership fee had been treated as an item separate and apart from the premium, and not returnable to the insured, and as fully earned immediately upon the collection thereof.

That in each of said reports of examination, the unearned premium reserve of the Company was computed by the Examiners upon the premiums in force as of the date of examination and in no instance was any item of membership fees in any manner included or considered in the computation of the unearned premium reserve liability of the Company.

[fol. 140] That in each of said annual statements prepared by the Company and filed with the various insurance departments as above set forth, the unearned premium reserve liability of the Company was computed upon the premiums in force as of the date of the statement and in no instance was any item of the membership fees included or considered in the computation of the unearned premium reserve liability of the Company.

That at no time has any insurance department or any commissioner of insurance or any official of any state in a similar capacity, other than the Wisconsin Department ever raised the question or asserted that the unearned premium reserve as computed by the Company in its annual statement as above set forth was not properly computed or that its membership fees were a part of its premiums for the purpose of computing its unearned premium reserve liability, but in each instance other than in Wisconsin, it has at all times been recognized that membership fees collected by the Company under its plan of operation are not returnable to the insured, are immediately earned and are separate and distinct from the premiums charged by the Company for insurance.

That affiant first met Mr. Duel some time in the fall of 1939, his best recollection being that it was in the month of November; that at that time he called upon Mr. Duel at his office in Madison; that he was accompanied by Mr. G. J. Mecherle, Chairman of the Board of Directors of the Company, and that the purpose of their visit was to discuss the licensing of the State Farm Life Insurance Company in Wisconsin; that at that time they told Mr. Duel and Mr. Yaudes, a deputy in his office, that they were about ready for the State Farm Mutual Automobile Insurance Company to begin the solicitation and sale of insurance through agency operations in Wisconsin and asked him if there was any reason why they should not so proceed; that Mr. Duel told them that there was nothing pending before him that would prevent the Company proceeding according to the rates and policy form that it had on file with the Department.

[fol. 141] That prior thereto it had filed with the Department a copy of the rate manual, it had prepared for its Wisconsin agency force, and the policy forms it proposed to use in its Wisconsin business; that these were prepared

for use under its membership plan and in said rate manual the membership plan was explained and had been on file with the Wisconsin Department since about July 29, 1939.

That about January 1, 1940, it did proceed with agency operations and to write business upon the membership plan and so continued until April 27, 1942; that no business has been written by it on the membership plan on or after April 27, 1942.

That while writing business upon said plan the net memberships and premiums collected by it in Wisconsin are as follows:

Period	*Membership*	*Premiums*
1939	192.00	7,821.01
1940	38,588.00	92,619.88
1941	98,987.50	347,005.42
1942 to April 27, 1942	31,232.43	170,403.81
Total	$168,767.50	$617,446.41

That the figures for 1942 are approximate, and that the figures for the years 1939, 1940 and 1941 are those reported by the Company in its annual statement as filed with the various insurance departments, including the Wisconsin Department.

That no person who become a policyholder of the Company under a policy written upon the membership plan in Wisconsin has ever made any demand upon the Company, for the return of said membership or any part thereof because of the Company's alleged improper use of the membership plan in Wisconsin. That until the answer of defendant was filed herein plaintiff was not aware that defendant made any claim that plaintiff must return to policyholders membership fees collected in Wisconsin by the plaintiff.

[fol. 142] That the Company is ready, willing and able to discharge any liability that it may have on account of the collection of said memberships in Wisconsin.

That he has caused a survey to be made of the records of the Company as to cancellation of the policies written in the State of Wisconsin on the membership plan, and particularly of any such policies that were cancelled within the first six months of insurance. That any part of the premium returnable to the insured on the cancellation of

such policies has been returned. That if it should be determined that there is a liability upon the part of the Company to return the membership fees collected by the Company on said policies in the same ratio that said premiums have been returned, the amount so returnable from said membership fees to said insured is not in excess of $4,000.00.

That after the decision of the Supreme Court was filed in the case of Duel vs. State Farm Mutual Automobile Insurance Co. 240 Wis. 161, representatives of the plaintiff Company including this affiant, attempted to learn from the defendant Commissioner what, if anything, the plaintiff Company might do to meet the defendant's objections to its being relicensed in the State of Wisconsin and to comply with the Department's requirements, that it was not able to secure such an audience, but that in April such an audience with an Assistant Attorney General representing the defendant was had by counsel for the plaintiff and that after such meeting, a further meeting was had between said Assistant Attorney General, plaintiff's counsel and certain of its representatives including this affiant, at which time said Assistant Attorney General stated that he had discussed the subjects covered at the first meeting with the defendant Duel, and that it was then the Commissioner's position that there were no circumstances or conditions under which plaintiff Company could be licensed in the state of Wisconsin. That it was then and there also stated by the said Assistant Attorney General that [fol. 143] it was the defendant's position that if the plaintiff wanted to cause a new Company to be incorporated in Wisconsin, under either the mutual or stock plan, that defendant would not object to said new Company taking over the business of the plaintiff in Wisconsin. That it was also then stated that the new Company could not operate on any plan other than the so-called level premium plan, which is the plan upon which the plaintiff has operated in Wisconsin since April 27, 1942. That it was then and there stated by the Assistant Attorney General as the Commissioner's position that neither such Company or any other Company would be permitted to operate in the state of Wisconsin on the so-called staggered premium plan—a plan whereby the Company charges a larger premium in the first insurance period than in the subsequent periods of insurance, to cover the larger expenses, including acqui-

sition costs, which are a part of the cost in the first period and do not need to be either incurred or paid by the Company in connection with subsequent periods of insurance. That such staggered premium plan is designed to give the continuing and persistent policyholder the benefit of lesser expenses from smaller renewal commissions, avoidance of the necessity for rewriting policies, prompt payment of premiums, and the like. That because of the attitude of the defendant, even though the plaintiff considered the same to be erroneous, but in an effort to avoid further dispute and disagreement, plaintiff adopted the level premium plan and put it into effect in the state of Wisconsin on April 27, 1942.

That he attaches to this affidavit and by reference incorporates herein as a part hereof Exhibit "B", the same being copies of documents in the files and records of the Company relating to the question of whether the membership fees as charged by the Company are premiums under the laws of the various states, and holding that such membership fees are not premiums in said states; that he also by reference incorporates herein the opinion of the Supreme [fol. 144] Court of North Dakota in the case of *Kreifels vs. State Farm Mutual Auto Ins. Co.* 62 N. D. 667, 244 N. W. 880 (1931) and the opinions of the California Appellate Court in the case of *State Farm Mutual Automobile Insurance Company vs. Carpenter*, 87 Pac. (2d) 867, Cal. App. 1939, (Hearing denied in the California Supreme Court on April 21, 1939,) and of the Circuit Court of Multnomah County, Oregon, in the case *State Farm Mutual Automobile Insurance Company vs. Hugh H. Earle*, as Insurance Commissioner of the State of Oregon, Case #125-696, decided January 29th, 1938.

That he has made a tabulation showing the assets and surplus to policyholders of the mutual casualty companies of the country having assets in excess of $5,000,000 and that he has computed the ratio of the surplus of said companies to their assets. What the results of said tabulation and computation are set forth in an exhibit attached marked "Exhibit C" and by reference incorporated herein. That the figures used therein were taken from the 1942 Edition of Best's Insurance Reports, (Casualty, Surety and Miscellaneous Edition).

That said tabulation shows that there are sixteen companies having assets in excess of $5,000,000 and that State Farm Mutual Automobile Insurance Company ranks sixth amongst said companies in the ratio of surplus to assets, and that amongst the companies having assets in excess of $15,000,000 the State Farm Mutual Automobile Insurance Company ranks first among said companies in the relation of surplus to assets.

That the plan of writing automobile insurance upon the membership plan, as used by the State Farm Mutual Automobile Insurance Company is followed by numerous other companies who use a plan that is in substantial identity with the plan of the Company; that such companies are domiciled in the following states: Minnesota, Ohio, Indiana, Kansas, Illinois and Iowa.

That one or more of said companies operate in the following states: Minnesota, Connecticut, Delaware, Maryland, New York, Ohio, Pennsylvania, Vermont, Virginia, [fols. 145-146] Kansas, Illinois and West Virginia.

That such companies operating on the membership plan in 1941 wrote 22.64% of the total automobile premium volume written by the mutual casualty companies of the country and in 1940 such companies wrote 20.18% of such total; that affiant is informed and upon information and belief states that each and all of said companies compute their unearned premium reserve liability in the same manner as does the State Farm Mutual Automobile Insurance Company.

That this affidavit is made for the purpose of opposing defendant's motion for summary judgment in the above entitled action.

Adlai H. Rust.

Subscribed and sworn to before me this 30th day of September, 1942. Lazetta L. Hawk, Notary Public, McLean County, Illinois. My Commission expires the 13th day of June, 1945. (Seal.)

[fol. 147] EXHIBIT "B" TO AFFIDAVIT

Kreifels v. State Farm Mutual Auto Ins. Co.
62 N. D. 667, 244 N. W. 880 (1931)

Insurance—when insured's check given for payment of premium was refused payment, policy under terms thereof held void.

1. Where, in an application for a policy of insurance to be issued by a mutual insurance company, it is specifically stated that if there be default in the payment of the check given for premium deposit on the policy to be issued, when such check is due and presented for payment, that such default "shall immediately and automatically void the policy issued • • • without notice of any kind" to the applicant, such policy so issued is void, and the company has no liability thereunder when the bank upon which it is drawn refuses to pay the said check on the ground that there are not sufficient funds on hand for payment.

Insurance—the fact that applicant had due and owing him portion of premium deposits on other policies does not affect the policy issued upon application in question.

2. The fact that such applicant had due and owing to him from the said insurance company unused portions of premium deposits on prior policies and that he desired to have such portions applied as part payment on the premium deposit for this new policy does not affect the validity of the policy issued upon the aforestated application.

Opinion filed October 22, 1932.

Appeal from the District Court of Ward County, Moelring, J.

Reversed.

Nestos, Herigstad & Stenersen, for applicant.

L. J. Palda, Jr., C. E. Brace, and Robert W. Palda, for respondent.

BURR, J.:

The plaintiff, claiming to be insured by the defendant against injuries to an automobile by reason of collision,

brought suit upon his policy to recover the sum of $920 for damages to the car, loss of time, etc. The defendant answered alleging that the policy upon which the plaintiff sued never had been in force.

Each side made a motion for a directed verdict. The trial court made findings of fact and ordered judgment for plaintiff in the sum of $667 and costs. Judgment was entered accordingly and the defendant appeals.

There are sixteen specifications of error; but appellant says that upon the evidence introduced the plaintiff is not entitled to judgment under the terms of the policy upon which he sued, and a favorable decision of this question settles the case.

[fol. 148] April 13, 1931, the plaintiff made application for insurance of a Chrysler car against collision and for insurance against liability and property damage, upon an application blank furnished by the defendant. The application contained this provision:

"It is understood and agreed that the membership fee and premium deposit is to be paid at the time this application is signed, by a check made payable to the company, and that liability on the part of the company is subject to all provisions of the policy as to payment of membership fee and premium deposit, and that default in payment of such check, when due and presented for payment, shall immediately and automatically void the policy issued hereon without notice of any kind to the undersigned."

A membership fee for the right to secure insurance and for the benefits as a member of the company is required, but it is no part of the premium for insurance; and a separate membership fee is required for each class of insurance. An applicant is required to make a premium deposit for each class of insurance desired to guarantee the payment of his share of the losses—balance to be repaid to him. In order to secure insurance on his car against collision the plaintiff was required to pay a membership fee of $5, and a premium deposit of $7; to have insurance on "liability and property damage" he paid an additional membership fee of $5 and an additional premium deposit of $12. On the date the application was received the policy of insurance against collision and for "liability and property damage" was issued to the plaintiff for a period of six months and "for such terms of six months or thereafter as

the premium deposit is restored as required by this policy, and the application therefor". The liability of the company for insurance against collision is expressly made "subject to the terms and conditions forming a part of this policy."

Among the terms and conditions of the policy is the following: viz.: that "this entire policy shall automatically and immediately be void without notice of cancellation or notice of any other kind: (1) if there shall be default of any kind, or for any reason whatsoever, in payment of the check given for the membership fee or premium deposit when the same is due and presented for payment."

The membership fee is never returned to the policyholder, and has nothing to do with the premium, but gives him a right to obtain insurance, and for every class of insurance he is required to take out an additional membership.

The company is a mutual insurance company. Each member is required to "pay his share of the losses and expenses as billed by the company, to restore his premium deposit for the purpose of renewal," and when the losses are deducted from the deposit the member is notified as to the amount necessary to keep up the premium deposit to the amount required. In other words the applicant "must restore the premium deposit, so as to have the full amount of the premium for the purpose of renewal for the next six month period."

[fol. 149] It appears that some time prior to this application the plaintiff was a member of the company and had insurance upon a car, making a premium deposit of $10. He obtained a second policy and was required to make an additional premium deposit of $12; and thus had paid $22 as premium deposits. His share of the losses and expenses thereunder was $8.51, and before the application for this policy he was in default in this sum of $8.51. He then sought another policy, took out additional memberships and the premium deposits under this new policy amounted to $19. Therefore the applicant was required to pay in all, including his deficiency, the sum of $27.51. The plaintiff desired that the premium deposits of $22 already paid be applied on his debt which would leave him a credit of $13.49, and he would pay the company $5.51 in addition. It is clear, therefore, that he owed the company $19 on the new policy

and if they credited him with the $13.49 on this new premium deposit he could pay for his new insurance by getting a credit because of this balance, and paying $5.51 in addition. Until this credit was applied and the $5.51 paid there would be no adequate premium deposit on this new policy.

The plaintiff understood this and drew his check for $5.51 to cover the benefits under this new policy. Upon receipt of the check the policy was issued, subject to the conditions hereinbefore stated. The check was dated April 13, 1931, and was turned over to the accounting department of the defendant company on April 26, 1931, at Bloomington, Illinois. In due course of business it was transmitted to the bank upon which it was drawn, but this bank refused to cash the check, returning it as "unpaid for want of funds"—the check being returned to the defendant company on or before May 6, 1931. Thereupon the defendant, on May 13, 1931, wrote to the plaintiff returning the check, and calling his attention to the fact that it had been returned to them unpaid with the notation "insufficient funds" and that therefore the contract of insurance "has automatically lapsed on date of expiration."

These facts are undisputed. Plaintiff says he did not receive the letter nor the check; but he does admit that from time to time he received from his bank the checks cashed and he did not find this check among such checks, neither does he claim that the bank cashed the check for the defendant.

It is the claim of the plaintiff that he never received any notice of cancellation of his policy; but under the terms of his application which he himself signed, any policy issued upon said application became "immediately and automatically void * * * without notice of any kind" if his check was not paid when presented for payment. The plaintiff is a traveling man and therefore we assume he is more or less familiar with business methods. For years he had been engaged in selling Underwood typewriters and accessories. He makes no claim that he was ignorant of business dealings and transactions. He knew that he was not entitled to any notice of cancellation of his policy. The letter written to the plaintiff notifying him that the check was not paid and that the policy was cancelled was mailed to the plaintiff by United States mail and a carbon copy thereof was duly received as evidence in this case. From the evidence therefore it is apparent the check was returned to the plaintiff and he was

notified of the cancellation of his policy even though he says he did not receive the letter.

The defendant testified that during the month of April he had sufficient funds in the bank to pay the check had it been [fol. 150] presented during that time, though he had no knowledge or idea as to how much money he had in the bank. This however is immaterial. The policy was not dependent upon there being sufficient money in the bank to pay, but upon payment of the check when presented.

So far as these parties were concerned this check was presented within due time. There is nothing to indicate the bank was insolvent and it was the duty of plaintiff to have money on hand to pay his check. If he did, and the bank refused to pay it, this was a controversy between him and the bank. No finding was made by the trial court on whether the check was presented within a reasonable time, nor is the issue raised by the pleadings.

It is said the company was in possession of part of the premium, that the check for $5.51 represented but a small portion of the necessary premium, that the insurance company did not return the portion of the premium in his possession nor offer to return it, therefore it cannot be heard now to say there was no insurance in effect.

This claim of estoppel is not raised by the pleadings, though urged by respondent. But concededly a person could be a member of a company and yet have no insurance and also the company could owe him the return of a portion of a previously paid premium deposit. The membership fee has no bearing upon the insurance premium. Under previous policies the defendant had made premium deposits and after deducting his share of the losses there was to his credit with the defendant company the sum of $13.49. This sum was not a premium deposit on this policy. It was the portion returnable from other and prior insurance policy deposits. He had a right to ask the company to apply this debt due him, upon his insurance policy, and the company was willing to do so. No application of this credit was made. No application could be made until the full amount of the premium was paid. It is not a case of the company receiving a portion of the premium deposit for the policy issued and refusing to return it.

Respondent says that under the provisions of Sections 6532 and 6533 he was entitled to a return of these previous deposits, and he was. Section 6532 says 'a person insured

is entitled to return of the premium * * * when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.' But this indebtedness due him from the company was not a premium deposit upon this policy unless so applied. A member in the company, may, after the amount of his losses is ascertained, leave any balance with the company for future appropriation, or he may have it returned to him. Hence the plaintiff could ask the company to apply it upon this insurance policy. He did do so, and the company was willing to credit him with it, if the insured would pay whatever extra was required. He did not do this so the company could not or did not make the application.

Section 6533 of the Complied Laws does not help the plaintiff. This section says: 'If a peril insured against has existed and the insurer has been liable for any period, however short, the insured is not entitled to a return of premiums so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under sections 6517 and 6530'. Section 6517 refers to a surrender of an insurance policy for cancellation and Section 6530 refers to a return [fol. 151] of premium when there is insurance for a definite period and the policy is surrendered by the insured before the expiration of the term.

This policy was issued April 13, 1931, and was for the period of six months, or until October 13, 1931. Even if he were entitled to insurance for the proportionate time the amount due him from the company would not insure this car for a period past the end of August, and this collision occurred September 27, 1931.

We are of the opinion that upon the undisputed facts in this case the plaintiff was not insured in this company at the time of the alleged loss. The judgment therefore is reversed and judgment ordered for the defendant dismissing the action.

Christianson, Ch. J., and Nuessle, Birdzell and Burke, JJ., concur.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 125-696

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY OF BLOOMINGTON, ILLINOIS, a Corporation, Plaintiff,

vs.

HUGH H. EABLE, as Insurance Commissioner of the State of Oregon, Defendant

MEMORANDUM OPINION

This is a suit for a declaratory judgment.

The statute, Section 46-109, provides:

"(1) Every foreign or alien company in its annual statement to the commission shall set forth the gross amount of premiums received by it from policies covering risks within the state during the preceding calendar year. It shall set forth therein, in separate items, return premiums, paid, payments made policyholders and considerations paid other companies for reinsurance in the state during such year, including premiums received for reinsurance of risks written by companies not licensed in this state during the preceding calendar year.

"(2) Computation and Charging of Tax.—If the commissioner find such report as filed by an alien or foreign insurance company to be correct, he shall compute an amount of two and one-fourth (2¼) per cent on the balance of such gross amount of premium after [fol. 152] deducting such return premiums, payments to policyholders for dividends and unabsorbed premiums and considerations paid for reinsurance in admitted companies, and charge the same to such company as a tax upon the business done by it in the state for the period shown by such annual statement. He shall forthwith mail to the last-known address of the principal office of such company 'a statement of the amount so charged against it, which amount the company shall pay to the comissioner on or before April 1 of each year. * * *

Section 46-1920 of the statute provides:

> "Tax upon insurance premiums for maintenance of department.—For the purpose of maintaining the department of the state fire marshal and paying all expenses incident thereto every insurance company transacting fire and automobile fire and theft insurance, and other insurers doing any insurance business within the State of Oregon, shall pay the insurance commissioner within sixty days after the passage of this act, and on or before the first day of April annually thereafter, a tax upon its premiums received from business transacted in this state as follows: A sum equal to one-half of 1 per cent of the gross premiums or assessments and dividends paid to policyholders received by it or them or its or their agents on direct business transacted by it or them in this state during the preceding calendar year, as shown by its statement on file in the insurance department."

The sole question involved in this case is whether certain membership fees, which anyone is required to pay who takes out insurance in the company, are a part of the gross premium.

The Supreme Court of North Dakota in the case of *Kreifels v. State Farm Mutual Automobile Insurance Company*, 62 N. D. 667, held directly the membership fee was not a part of the premium. The attorney general of the State of Michigan reached the same conclusion in a very lucid opinion, and Judge Maurice T. Tooling, Jr., of the Superior Court of California, in and for the county of San Francisco, reached a like conclusion.

A reading of the policy indicates clearly that the membership fees are not considered as a part of the consideration for the insurance.

The Court is of the opinion that the reasoning in these cases is clear and well founded, and therefore has reached the conclusion that the membership fees are not taxable [fol. 153] under the sections above referred to.

Dated at Portland, Oregon, this 29th day of January, 1938.

(Signed) John P. Winter, Judge.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 273,092

Dept. No. 1

(Extra Sessions)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, Defendant

MEMORANDUM ORDER FOR JUDGMENT

Affir[illegible]

I e[illegible] important[illegible] express briefly [illegible] for my decision.

1. The Propriety of the Remedy by Injunction.

A. Plaintiff has no adequate remedy at law. It is contended that plaintiff has an adequate remedy at law under Political Code, Sec. 3669. I do not so regard it. The section is discretionary with the State Board of Equalization insofar as credit for a previous overassessment is concerned. "The State Board of Equalization *may* at the time of the following assessment * * * credit such overassessment * * *" [fol. 154] While "may" is sometimes construed to mean "must" in statutory construction, it cannot bear that construction here because the use of the words "shall" and "may" in the same sentence shows that they were used designedly by the Legislature—"the Insurance Commissioner * * * *shall* include in his next annual report * * * a statement of the amount of premium and tax which * * * was overassessed, and the State Board of Equalization *may* * * * credit such overassessment * * *."

B. A public officer may be enjoined when he is acting beyond his statutory authority.

It is argued that under Sec. 526, Subd. 4, C. C. P. and Sec. 3423, Subd. 4, C. C., an injunction will not lie herein. But

these provisions are not applicable where the public officer is proceeding in a manner not authorized by the statute, or beyond the powers granted him by the statute. (*Payne v. English*, 79 Cal. 540, 548; *Pierce v. Los Angeles*, 159 Cal. 516; *Las Animas Land Co. v. Preciado*, 167 Cal. 580.)

2. Are the Membership Fees Here Involved a Part of the Gross Premiums of Plaintiff Within the Meaning of Cal. Const. Sec. 14, Art. XIII?

There can be no question that in ordinary usage "the word 'premium' in the law of insurance * * * means the amount paid to the company as consideration for insurance." (32 C. J. p. 1192, Sec. 324; 14 Cal. Jur. p. 469, Sec. 42.)

Under the testimony in this case (affidavit of Beedle admitted by stipulation) and the language of the application and policy I am satisfied that the membership fee is no part of the consideration for the insurance.

However, it is argued that under *Bankers Life v. Richardson*, 192 Cal. 113, it has been held that the tax on insurance companies under the constitution is a "gross earnings" tax and hence includes these membership fees whether premiums [fol. 155] or not. But the language in the Bankers Life case must be read in connection with the point actually decided, i. e. whether "Assessments", where insurance was written on the assessment plan, were taxable as "gross premiums". Considering the [illegible] history the court held that they were, [illegible] in so doing characterized the tax as a "gross earnings tax". But it must be remembered that "assessments" under that plan for insurance are equally the price paid for the insurance coverage, as are "premiums" in the ordinary policy; and I do not feel that the Supreme Court meant to go further in characterizing the tax as a "gross earnings tax", than to mean gross earnings from the writing of insurance. So construed it would not cover the membership fees here in question.

Judgment for the plaintiff granting a permanent injunction as prayed.

(Signed) Maurice T. Dooling, Jr., Judge.

December 15, 1937.

9-2789

Mr. Charles E. Gauss, Commissioner of Insurance, Lansing, Michigan

Dear Sir:

Re: State Farm Mutual Automobile Insurance Company

This is to acknowledge receipt of your letter dated November 5th, in which you request our opinion whether the membership fees charged by the State Farm Mutual Auto Insurance Company, of Bloomington, Illinois, may properly be considered part of the taxable premium within the meaning and the provisions of Sections 12377, 12331 and 12666 of the Compiled Laws of Michigan for 1929, as amended.

[fol. 156] The policy of insurance issued by the company in Michigan contains the following provisions:

> "This insurance is for only such and so many of the following coverages as are indicated by a specific premium in writing set opposite thereto."

The schedule describes specific coverages and states the respective membership fees and premiums for each type of coverage. It further recites that, "in consideration of the premiums hereinafter mentioned, (it) does insure," the assured for the term, coverages, and limits indicated. It also provides that "the contingent liability of the assured is limited to an amount equal and in addition to the premium set out in this policy, and then only for his equitable share of losses and expenses incurred while he was insured. The membership fees set out in this policy, which are in addition to the premiums are not returnable but entitle the assured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the assured remains a desirable risk."

The by-laws of the company provide that the "membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy." The by-laws contain a similar provision with reference to the premiums for different kinds of insurance.

The general agency contract between the company and the Mutual Agency Company discloses that the entire membership fee collected in Michigan is paid as commission or compensation to the general agent, and that the company keeps no part of it.

Section 12665, subsection 12 of the Compiled Laws of Michigan for 1929 provides as follows:

> "The taxable premiums of any mutual insurance company admitted in this state under this chapter for the purpose of taxation under any law of this state shall be the gross direct premiums received for insurance upon property or risks in this state, deducting premiums upon policies not taken and premiums returned on cancelled policies and also any so-called dividend or other return made to the policyholder other than for losses: Provided, that in case of any company receiving deposits or deposit premiums, the taxable premiums shall be the portion of such deposits or deposit premiums earned during the year."

A premium is commonly defined as consideration paid for insurance.

> "Gross premiums generally mean all premiums that remain in the treasury of the company, without counting any deductions for commissions for agents or the expenses of doing business."
>
> (Citing Cooley on Taxation, (4th Ed.) Sec. 941, page 1889; *People v. Miller*, 70 N. E. 10).

[fol. 157] In this case several facts are present which militate against the membership fee being taxable as a premium under the Michigan Act. In the first place it is expressly excluded by the terms of the policy contract from the price or consideration paid for insurance. In itself, the distinction would not be controlling, but by the terms of the policy, all assessment liabilities are predicted upon and fixed with reference to the amount of the premium paid, expressly excluding the membership fee. Furthermore, the membership fee, as explained by the company in a written brief, is payable only once, while a uniform insurance premium is paid regularly for each term or renewal. To hold that a membership fee constitutes a premium under the circumstances is to sanction a discrimination in rates against policyholders not subject to additional

membership fees and insured for the same kind of risks. The membership fee is never returned to the policyholder on cancellation or termination of the policy. It has been held by a court of competent jurisdiction that being solely a membership fee, it is unavailable for the payment or purchase of extended insurance.

(Citing *Kreifels v. State Farm Mutual Auto Insurance Company*, 62 N. D. 667).

That the company benefits from the collection of the membership fees is not open to serious question, but the benefit is of a nature that is legally distinguishable from the expressed and actual consideration paid for insurance. There are other considerations which might be urged in support of this conclusion, but inasmuch as any reason that may be presented in support of the contention that the membership fee constitutes a taxable portion of the gross premium, advances, at most, a doubtful interpretation of the act, we are constrained from expressing a contrary conclusion by force of the established principal of law that tax statutes must be construed strictly in favor of the taxpayer, and that ambiguity or uncertainty must be resolved in favor of the taxpayer.

> "Words 'premiums on insurance', when used in statutes, must be given their generally accepted meaning in absence of something in the context or other portion of the statute showing a different legislative intent.
>
> "Statutes creating taxes are strictly construed and are not extended by implication beyond clear import of language used."
>
> "Citing *Daniel v. Life Insurance Company of Virginia*, 102 S. W. (2d) 236 (1937).

It is therefore our opinion that the membership fee received in Michigan by the State Farm Mutual Auto Insurance Company does not constitute a taxable portion of the gross direct premiums received by the company for insurance upon property or risks in this state.

Very truly yours, Raymond W. Starr, Attorney General, by John H. Brennan, Deputy Attorney General.

JT:gy

[fol. 158] Official Minute of Meeting Board of Insurance Commissioners

Austin, Texas

Date: January 25, 1937

Members Present:	Yes
R. L. Daniel	Yes
Marvin Hall	Yes
R. C. Waters	Yes

Subject Considered:

Re: State Farm Mutual Automobile Insurance Company, Bloomington, Illinois—Membership Fees

General Remarks and action taken:

At a meeting of the Board of Insurance Commissioners of Texas on this 25th day of January, 1937, came on for consideration the question of whether or not the membership fee charged by the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, should be treated as part of the premium. It appearing that the supreme court of some other States has held that this membership fee was not a part of the premium and there being no authority on the question in the State of Texas, the Board is of the opinion that it should follow the decisions of the higher courts of other states:

Therefore, it is ordered by the Board that, in figuring the premium income of the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, for tax purposes in Texas, the membership fee shall be excluded and not treated as part of the taxable income of said company.

(Signed) R. L. Daniel, Life Insurance Commissioner, Chairman; Marvin Hall, Fire Insurance Commissioner; R. C. Waters, Casualty Insurance Commissioner.

INSURANCE DEPARTMENT

R. E. O'Malley
Superintendent

J. Frederic Allebach
Deputy Superintendent

State of Missouri, Jefferson City

February 12, 1937.

State Farm Mutual Automobile Insurance Co.
Bloomington, Illinois.

GENTLEMEN:

[fol. 159] We received your letter of January 25 in connection with the tax on membership fees collected in the State of Missouri. We have also received the brief of your counsel on the question as to whether or not Section 5979 Revised Statutes of Missouri, 1929, is applicable to such fees.

We have come to the conclusion that the membership fee paid by each insured over and above the actual premium or assessment collected for insurance is not a payment in the nature of a premium; that the part of Section 5979 which provides that every foreign insurance company or association shall "annually pay tax upon the premium received" cannot be construed to apply to the membership fee.

Yours very truly, (Signed) J. P. Allebach, Deputy Superintendent.

JPA:FN

DEPARTMENT OF INSURANCE

Oklahoma City, Oklahoma

November 5, 1936

Ekern & Meyers, One LaSalle Street, Chicago, Illinois.

GENTLEMEN:

In view of the explanation contained in your letter of October 19, and after having discussed the question of additional taxes with your Mr. Matthias, we have come to

the conclusion that membership fees collected by the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, in this state are not taxable as a part of the premiums collected by the company in Oklahoma.

Thanking you for your consideration in this matter, we are

Very truly yours, (Signed) Jess C. Read, Insurance Commissioner; by F. H. Petrie, Assistant.

[fol. 160] STATE INSURANCE DEPARTMENT OF MARYLAND

Baltimore

December 19th, 1936.

Ekern & Meyers, Esqs., 1 LaSalle St., Chicago, Ill.

Attention Mr. Erwin A. Meyers

DEAR MR. MEYERS:

I have carefully read and considered yours of Dec. 17th, and have reached the conclusion that the facts and the law covering the case of the State Farm Mutual Automobile Insurance Co. justify the position that membership fees collected by said company are not part of the consideration for the insurance, and therefore should not be included within the term "gross premiums", and therefore should not be subject to the Maryland tax on gross premiums.

Yours very truly, (Signed) W. S. Hanna, Insurance Commissioner.

April 2, 1937.

Mr. Charles F. Robbs, Commissioner of Insurance, Building.

Subject: Premium Tax on Membership Fees of State Farm Mutual Automobile Insurance Company

DEAR SIR:

G. S. 40-252, subsection 3 under Insurance Companies Organized under the laws of other States, provides that in

addition to other fees, any mutual fire insurance company, and any mutual automobile indemnity association shall pay a tax annually upon all premiums received, at the rate of 2% per annum.

G. S. 40-1211 states:

> "The taxable premiums or premium receipts of any mutual insurance company organized in or admitted to this state for the purpose of taxation under any laws of this state, shall be the gross premiums received for direct insurance upon property or risks in this state, deducting premiums upon policies not taken, premiums returned or cancelled policies, and any refunds or returns made to policyholders other than for losses."

[fol. 161] The question in this case is whether or not certain so-called membership fees charged by this company are taxable as premiums. It appears that any applicant for insurance must sign an application, and states that he makes application for membership in the company and for insurance in the company. For each different type of insurance he desires, he must pay a separate and distinct membership fee, also a stated sum, which, according to the contract of insurance, is a premium for the insurance. After the membership fee is paid he may continue his policy in force by paying at stated periods the premium designated, but no additional membership fee is paid. The evidence further showed that this membership fee was used by the company for the purposes of paying its agent who secured the business, who received approximately 50% thereof, and that the other 50% went into the general revenue of the company, was segregated and used for the purpose of investigating the applicants as to whether or not they were insurable; and second, the maintaining of a travel bureau of information; and third, for the expense of the company in putting the applicants named on the books of the company as members thereof.

The true test of premium and the meaning thereof is set forth in 32 C. J. P. 1192, as the consideration or the amount paid to the company as consideration for the insurance or for the policy. This definition is agreed to by the company on p. 2 of their letter to you under date of March 30, 1937, signed by Erwin A. Meyers.

As a result thereof, it seems to me that the true test in this case as to whether or not the so-called membership fee is taxable is whether or not in fact it is a premium income of the company, and is a part of the consideration for the issuance of the insurance or policy.

Viewing it from this light, it must be said that no distinction can be made for commissions of agents or the expense of carrying on the business of the company as a separate and distinct item from the premium for taxation purposes.

In *People, ex rel. Continental Insurance Company v. Milliger*, (N. Y. Ct. of App.) 70 N. E. 10, wherein a tax on gross amount of premiums received by comestic companies for business done in the state was under discussion, and where the Insurance Commissioner exacted a tax for premiums which were refunded to policyholders upon cancelled policies, the court held that such premiums were not part of the gross premiums for business done. The Court stated on p. 11:

> "It may be asked why did the statute say gross premiums? Unless it means all premiums received, whether refunded or not, we think the use of the word 'gross' was intended to include all premiums that remained in the treasury of the company, and to exclude any deductions for the commissions of agents or the expense of business. The gross amount collected from cancelled policies means a gross amount collected and retained by the company. The amount paid back is not collected for business done * * * There is no dispute as to the meaning of the word *gross*, and it is conceded that it means a whole or entire amount of premiums received for business done in this state during the year. The word *gross* is opposed to *net* and its ordinary meaning is the entire amount of receipts of the business, while the net receipts are those remaining after deduction for expenses and charges of conducting the business."

[fol. 162] From the reasoning in this case, it can be said that the amount paid an agent is part of the ordinary conduct of the business, and is therefore normally chargeable against the gross premiums received. The expense of putting the names of persons on the books of the company comes under the same definition. The expense of investi-

gating applicants falls within this category. The mere fact that the company maintains a travel bureau which does not appear to be a requirement under the contracted insurance or the application for membership, is merely in the nature of advertising the company and is a proper charge to the general maintenance of the company's business. As a result, regardless of the fact what they call this portion of the money received from the applicant, it goes into the fund for the general maintenance of the company in carrying on the business of insurance, and could therefore be properly termed in fact a part of the premium.

Upon reading the case of *Kreifels v. State Farm Mutual Automobile Insurance Company*, 62 N. Dak. 667, wherein the plaintiff claimed to be insured by the defendant against injuries to an automobile by reason of collision, the policy of insurance was issued by this same company, a membership fee was paid and insurance premiums paid as required by the company, but the renewal premium had not been paid at the time loss occurred, and the plaintiff sought to sustain the view that the membership fee was in the nature of a deposit and would pay the premium as extended insurance. The court refused to accept this view, and held against plaintiff. On page 671 it is stated in the opinion "the membership fee has no bearing upon the insurance premium," and this language is not used in the holding of the court in connection with the actual determination of the point involved in this case, but in the North Dakota case it was evidently contended by the company, and the court in discussing the case, stated:

> "Each member is required to pay his share of the losses and expenses as billed by the company to restrict his premium deposit for the purpose of renewal, and when losses are deducted from the deposit, the member is notified of the amount necessary to keep up the premium deposit to the amount required."

As a result of the fact that a different membership fee is required for each class of insurance that might be written in the same policy, it would seem that the real purpose of the membership fee is not to entitle the party to become a member of the company, but is to pay a part of the burden of carrying the particular insurance risk involved. Whether it is contended that the membership fee is to pay the ex-

penses as set forth above and presented to the Commissioner at the hearing, or whether it is, as contended in the North Dakota case, a premium deposit, makes very little difference in my opinion. If it is a premium deposit and not returnable to the insured, then it becomes a part of the funds of the company to be used by them for whatsoever purposes they may determine in the carrying on of the company's business, and this was so held in the case of *Manufacturers Mutual Fire Insurance Company v. Commonwealth*, 41 Pa. Co. 105.

It is true that all taxation statutes are construed strictly, [fol. 163] and in favor of the taxpayer, yet a taxpayer cannot, by dividing up the things sought to be taxed, and calling a portion of that thing by another name, evade taxation thereon, and although this company has been operating on this plan for a number of years, it would not seem that it was any deliberate attempt to evade the premium tax, as the statute was not enacted until 1927 and the company has operated under the present plan since its organization and since its admission to do business in the State of Kansas.

To hold the membership fee taxable under our statute would require a broad construction of the tax statute. The rule of this state and other states, is that tax statutes should be strictly construed and in favor of the taxpayer. The company exacts the membership fee but once. Thereafter so long as a member renews his policy by paying the amount designated as a premium each year, he may continue the policy in force subject to certain conditions not material here. If the membership fee was a premium this would make the total premium under the policy indefinite and dependent upon whether the insured in one case continued to pay his annual premiums for the same period as an insured in another case. Otherwise, one insured would pay a higher rate of premium than another. From this alone it can hardly be said that the membership fee is premium.

There is no question but what the membership fee is a part of the general income of the company and helps to support the general operations of the company and to carry on the general business of the company, and would be a proper item for taxation. The question is, has the legislature by the language used taxed it? The Kansas court

has held that premium has a specific meaning in the insurance business, 70 N. E. 15 and 61 C. J. 311, and is that consideration paid for the risk insured. Under the plan of operation of this company, it can hardly be said that the membership fee is any payment for the risk insured, because it is not required any time after the initial payment no matter how long the policy might remain in effect by paying what is termed by the company, a premium in addition to the membership fee.

As a result it is the opinion of this office that a membership fee charged by the company is not subject to the gross premium tax because of the requirements of the strict construction of the tax statute, and because of the plan and operation of the company.

Very truly yours,—— ——, Attorney General.

CHM:MH

[fol. 164] INSURANCE DEPARTMENT—STATE OF MISSISSIPPI,
JACKSON

John S. Williams, 3rd,
Commissioner.

February 25, 1938.

State Farm Mutual Automobile Insurance Company,
Bloomington, Illinois.

GENTLEMEN:

I have just had a conference with your attorney Mr. Matthias, and am giving you the following information at his suggestion.

Under the present Privilege Tax Laws of Mississippi, the membership fees collected by your Company are not subject to premium tax as they are not considered premium payments.

Very truly yours, (Signed) John Sharp Williams, 3rd, Commissioner of Insurance.

JSW:d

STATE OF NORTH DAKOTA,

OFFICE OF ATTORNEY GENERAL,

BISMARCK

April 19, 1938.

Mr. M. R. Prenner, Actuary State Department of Insurance, Bismarck, N. Dak.

DEAR MR. PRENNER:

I have your letter of March 7th in which you request our opinion as to whether membership fees collected by the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois are subject to tax under our statute, Section 4924 of the 1925 Supplement, providing for gross premium tax:

I have very carefully examined the policy form which you submitted with your letter, and after carefully considering the same have concluded that membership fees in this company are not taxable as premiums under our law. In the first place, this membership is payable only once and is by the terms of the policy excluded from consideration paid for the insurance. It is true that every applicant for the insurance in this company must first become a member of the company but the fact that he has paid his membership does not give him one day's protection. He must pay the regular premium rates fixed for various types of coverage, and that premium only is the consideration for his policy. Furthermore, this membership fee once paid is never returned to the insurer on the termination of his insurance policy. Any unearned portion of the premium must be returned.

[fol. 165] Our Supreme Court in the case of Kreifels v. The State Farm Mutual Automobile Company of Bloomington, Illinois, 62 N. D., 667, 244 N. W., 880, has held that this membership fee cannot be applied as payment of insurance or for the purpose of extending the insurance after the period for which premium was paid has expired. The court in that case says:

> "A membership fee for the right to secure insurance and for the benefits as a member of the company is required but it is no part of the premium for insurance."

Again the court says:

> "The membership fee is never returned to the policyholder and has nothing to do with the premium * * * *"

It may be argued that the company derived some benefit from the payment of these membership fees. That may be true in a sense but under the terms of the policy such benefit as might be derived cannot be held to be a consideration for the insurance. Especially is this true when we consider these facts in the light of the decision of our own court cited above.

Tax statutes are considered penal in their nature and must, therefore, be strictly construed.

We are, therefore, of the opinion that the fees paid for membership in the company are not taxable as part of the premium under Section 4924 of the 1925 Supplement, which provides for a gross premium tax.

Very respectfully submitted, (Signed) Al C. Strutz, Attorney General.

AC'S:RGM.

November 6, 1939.

Honorable Edgar B. Sims, Auditor and ex-officio, Insurance Commissioner, Charleston, West Virginia.

Dear Sir:

I am in receipt of your letter of October 18, 1939, which is in part as follows:

> "We are having some difficulty in determining the amount of taxes due the state from certain mutual automobile insurance companies for the reason that said companies charge a given premium but, before permitting the car owner to have insurance, require him to pay a large membership fee for each kind of coverage wanted by the car owner. For example, if the applicant desires fire, theft, collision, property [fol. 166] damage and bodily injury liability insurance on his car, he must pay the company a $5.00 joining fee for each of the coverages for which he applied. The payment of this joining fee for each type of coverage obtained assumedly provides for life membership

and entitles the car owner to purchase insurance in subsequent years without any additional membership fee. The premium paid, of course, varies with the experience of the companies and is in addition to the membership fees. The companies report to us that these membership fees are used to defray acquisition costs. If a policyholder surrenders or ceases to insure with the particular company, as a rule, the membership fee is forfeited.

"Now, what we want to know is, is that membership fee a part of the premium in fact exacted from the public and should it be taxed in calculating the 2% tax due the state? This office holds that these membership fees are part of the premium because the purchaser cannot secure insurance without paying such fees and is part of the price exacted and named in the policy. We feel that it is just as much a part of the premium paid as the agent's commission is a part of the premium collected by other companies."

The gross premium tax to which you refer is found in Code 1931, Chapter 33, Article 2, Sections 37 and 39, which, respectively, are as follows:

"Every insurance company or association incorporated by or organized under the laws of any other state and licensed to transact business in this State shall return annually, on or before the first day of March, to the insurance commissioner, under the oath of its president or secretary, a statement of the *gross amount of premiums* collected and received by it for the previous calendar year of business done in this State; and, upon receiving from the commissioner a certificate of the acceptance of such return and of the amount of tax due thereon, such company shall pay such tax to the insurance commissioner annually on or before the first day of March. The insurance commissioner may, if he deems best, require from every such company a bond, with surety, for the payment of such tax" (Italics ours).

"The annual tax which an insurance company or association is required to pay under the provisions of the two preceding sections shall be a sum equal to two per cent of the *gross premiums received by it* on the

business written or renewed in this state, less premiums returnable for cancellation, and including any so-called dividends on participating life insurance policies actually applied in reduction of premiums. All such taxes paid to the commissioner shall be paid to him into the state treasury for the benefit of the state fund" (Italics ours).

The sole question thus involved is whether a membership fee was intended to be included within the term "gross premium", in computing the two per cent tax imposed by law upon insurance companies.

In the absence of a Supreme Court decision in this state, [fol. 167] it would seem advisable to refer to general law and decisions of the highest courts of other states having similar or like statutory provisions respecting the taxing of gross premiums of insurance companies. While a definition of the word premium is not conclusive in the determination of this question, it is at least interesting to note that a premium is generally considered to be a consideration for insurance. 2 Bouvier's Law Dictionary, Unabridged, 3rd Revision, page 2669; 32 C. J. 1192; 14 R. C. L. 957; 11 Amer. & Eng. Ency. of Law, page 304. Generally the courts have not attempted to give to the meaning of the word "premium" a broader conception than the above definitions; however, we do find that the case of Daniel v. Life Ins. Co. of Virginia, Tex. Civ. App. 102 S. W. (2d) 256, at page 259 states that a premium is the consideration paid, whether in money or otherwise, for the contract of insurance. That the premium may take any of various nominal forms, as that of initiation fee, an administration fee, an assessment, or a stipulated single or periodic payment, according to the nature of the insurance.

Also, the case of Northwestern Life Association v. Stout, 32 Ill. App. 31, at page 38, goes so far as to state that the word "premium", as used in the law relating to the business of insurance, regardless of the name by which it is called, includes everything involving consideration for an insurance policy. However, in none of the above cases was the court directly considering the application of the right of a state to tax the membership fee as a part of the gross premium, but, by way of dictum, broadly defined "premium."

The only case we have been able to find directly in point is the very recent decision of the District Court of Appeal, First District, Division 2, California, decided February 21, 1939 (hearing denied by the Supreme Court of California April 20, 1939) styled State Farm Mut. Automobile Ins. Co. v. Carpenter, 87 Pac. (2d) 867, which is in part as follows:

> "The controversy rests on section 14 of article 13 of the Constitution and sections 900-909 of the Insurance Code, St. 1935, pp. 529-531, which takes the place of the Political Code sections in force at the time, but which are of the same purport and hence referred to for convenience. 'Every insurance company * * * shall annually pay to the State a tax * * * upon the amount of the gross premium * * * received from its business done in this State * * * * * * The question thus arises whether the company may specify the income received from membership fees separately from the 'cash premiums received', and whether the former should be included in the 'gross premiums' and thus become subject to the constitutional tax.
>
> "* * *
>
> "'Are the membership fees here involved a part of the gross premiums of plaintiff within the meaning of California Constitution, Section 14, Article 13?
>
> "'There can be no question that in ordinary usage the word 'premium' in the law of insurance * * * means the amount paid to the company as consideration [fol. 168] for insurance" (32 C. J. p. 1192, Sec. 324; 14 Cal. Jur. p. 469, Sec. 42).
>
> "'* * *'
>
> "The statement in the memorandum that the membership fee is no part of the consideration for the insurance is fully supported by substantial evidence, and this would be conclusive upon this appeal even if findings had not been waived. Lucas v. City of Los Angeles, 10 Cal. (2d) 476, 75 p. 2d 599. It appears from the reporter's transcript without controversy or dispute that these membership fees are charged to all applicants for membership, that, though a membership entitles the holder to apply for insurance, it does not entitle him to receive it, and that the membership fees are not returnable if insurance is rejected. It appears equally

> that if the member elects to exercise his option he may purchase insurance upon payment of the required premium, but that if he does not so elect, and does not pay the specified 'premium' he receives no insurance protection."

Also see the case of Kreifels v. State Farm Mut. Automobile Ins. Co. (N. D.) 244 N. W. 880, at 881, which states:

> "The membership fee is never returned to the policyholder, and has nothing to do with the premium but gives him a right to obtain insurance and for every class of insurance he is required to take out an additional membership".

Some help can be realized also from reference to Chapter 33, Article 10 of the Code, which provides the qualifications and powers of automobile mutual insurance companies in this state, and especially to Section 4 thereof, which provides that an automobile mutual insurance company shall have "power to prescribe the qualifications and the manner and form of the admission and withdrawal of members; * * * and to make all further necessary provisions concerning the conduct of its business or affairs." Therefore, it might seem that as long as the very nature of this company is a mutual organization, and more akin to fraternal or group membership than the usual conception of insurance companies, the membership fee, if valid in law, a question which is not here considered, when treated as apparently is the situation here, is entirely separate and apart from the assessment or premium.

While it is true that Code, 33-10-14, defining what shall be considered as a "gross premium" upon automobile mutual insurance companies, as well as Code 33-2-37 and 39, above, do not clearly indicate the intention of the legislature with respect to membership fees, we are constrained to follow the general rule that a tax shall be strictly construed against the levying authorities, at least where, as here, the weight of authority appears to be opposed to allowing the tax.

Trusting this answers your inquiry in full, I am,

Yours very truly, (Signed) Clarence W. Meadows,
Attorney General.

CWM:EBS LES.

[fol. 169] W. B. Harrison, Insurance Commissioner

A. R. Wright, Deputy Commissioner

INSURANCE DEPARTMENT

State Capitol
Atlanta

March 26, 1938.

Mr. Russell H. Matthias, Attorney at Law, 1 LaSalle Street, Chicago, Illinois

DEAR MR. MATTHIAS:

This is in somewhat belated acknowledgment of your letter of March 21st, with which you enclosed a memorandum of indicated rates for various coverages on a New Ford Sedan compared with stock company conference rates which is for the purpose of comparison with mutual companies doing business in this state.

Your letter and the enclosure is in connection with the matter of membership fee collected from assureds in this state which has been the matter of an extended correspondence between the State Farm Mutual Automobile Insurance Company, of Bloomington, Illinois, and this Department.

On the occasion of your visit you left a file of opinions and decisions in other states touching the liability of the mentioned company for the payment of premium taxes on membership fees.

After a further review of this matter it is our opinion that there exists no premium tax liability on membership fees of the named company, and this letter may be accepted as authority in the circumstances.

Reciprocating your kind regards, believe me,

Sincerely yours, (Signed) A. R. Wright, Deputy Insurance Commissioner.

ARW/M.

[fol. 170]

EXHIBIT "C" TO AFFIDAVIT

Mutual Casualty Companies With Assets Over Five Million

Company	Assets (12/31/41)	Surplus to Policyholders	Ratio of Surplus to Assets
American Mutual Liability	47,908,092	9,049,071	18.8%
Employers Mutual (Des Moines)	5,044,889	1,100,000	21.3%
Employers Mutual (Wausau, Wis.)	27,661,283	5,750,480	20.7%
Factory Mutual	14,136,094	10,089,117	71.3%
Farm Bureau Mutual (Columbus)	8,467,344	2,694,196	31.8%
Hardware Mutual (Stevens Point)	15,948,357	3,664,079	22.9%
Interboro Mutual	5,168,599	2,066,386	39.9%
Liberty Mutual	90,222,300	17,703,627	19.6%
Lumbermans (Chicago)	45,363,288	6,000,000	13.2%
Michigan Mutual	9,899,324	2,567,883	25.9%
Pennsylvania Thresherman	5,921,371	1,400,315	23.6%
Security Mutual Casualty	9,171,971	4,426,779	48.2%
State Auto—Columbus	8,857,499	4,296,869	48.5%
State Farm	25,410,221	9,197,430	36.0%
Texas Employers	6,162,356	2,285,356	37.0%
Utica Mutual	15,002,269	4,276,108	28.5%

[fol. 171] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

ACTION INSTITUTED IN MAY, 1942

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT—Filed

June 21, 1943

The defendant herein by John E. Martin, Attorney General for the State of Wisconsin, and Harold H. Persons, Assistant Attorney General, as his attorneys, moved the court for summary judgment dismissing the plaintiff's complaint herein. The plaintiff by R. M. Rieser and H. H. Naujoks, its attorneys, and Ekern, Meyers & Matthias of counsel, opposed the motion.

Upon the whole record and the motion papers, and after listening to the arguments of counsel and examining their briefs, and the court being fully advised in the premises;

It Is Ordered:

1. That the motion for summary judgment dismissing the plaintiff's complaint be and hereby is granted.

2. That no motion costs are allowed.

3. Let judgment be entered accordingly.

Dated, June 21, 1943.

By the Court:

August C. Hoppman, Judge.

[fol. 172] MEMO.

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

[fol. 173] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the state of Wisconsin, Defendant

(Action III—Instituted May, 1942)

JUDGMENT—Filed July 3, 1943

The above entitled action having been heard before the Court, without a jury, on the defendant's motion for summary judgment, the plaintiff appearing by its attorneys, Rieser & Mathys, represented by R. M. Rieser, and Ekern & Meyers, represented by Herbert H. Naujoks, and the defendant appearing by its attorney, John E. Martin, Attorney General of Wisconsin, represented by James

Ward Rector, Deputy Attorney General and Harold H. Persons, Assistant Attorney General, and after considering the affidavits, records and documents attached to the motion of the plaintiff, the affidavits, records and documents submitted by the plaintiff in opposition thereto, and all of the records, files and proceedings herein and the arguments of counsel and briefs submitted, the Court having [fol. 174] filed a memorandum opinion and entered an order herein on the 21st day of June, 1943 granting the defendant's motion for summary judgment dismissing the plaintiff's complaint and directing the entry of judgment accordingly;

It is hereby adjudged:

1. That the plaintiff's complaint herein and this action be and the same hereby are dismissed.

2. That neither of the parties shall recover any costs of the other, except that the defendant shall recover of the plaintiff the sum of $——, unpaid clerk's fees (to be inserted by the Clerk herein if not paid by the plaintiff).

3. That the temporary injunction heretofore entered on the 19th day of May, 1942, is hereby vacated and set aside.

Dated July 3rd, 1943.

By the Court:

August C. Hoppmann, Circuit Judge.

Approved as to form prior to signature.

R. M. Rieser, Attorney for Plaintiff; H. H. Persons, Attorney for Defendant.

[fols. 175-176] In Circuit Court of Dane County

[Titles omitted]

Action Insituted in May, 1942

Action Instituted in April, 1943

Notice of Appeal—Filed July 20, 1943

Please take notice that State Farm Mutual Automobile Insurance Company, plaintiff above named, hereby appeals to the Supreme Court of the State of Wisconsin from the

whole of a Judgment entered in each of the above entitled actions on the 3rd day of July, 1943, a copy of each of such judgments being hereunto annexed marked exhibits A and B and made a part hereof.

Dated July 19, 1943.

R. M. Rieser, Herbert H. Naujoks, Plaintiff's Attorneys.

To John Martin, Attorney General, Harold H. Persons, Assistant Attorney General; Attorneys for the Defendant in each of said actions. Myrtle L. Hansen, Clerk of Circuit Court of Dane County, Wisconsin.

Service admitted this 20th day of July, 1943. Myrtle L. Hansen, Clerk.

Due service admitted this 20th day of July, 1943. John E. Martin, Attorney for Defendant.

[fol. 177] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the state of Wisconsin, Defendant

BILL OF COMPLAINT—Filed May 4, 1943

The State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, brings this, its Bill of Complaint, against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for cause of action complains and alleges that:

1. The plaintiff, State Farm Mutual Automobile Insurance Company, is and was during all of the times herein mentioned a mutual, non-profit automobile insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, and was and is a citizen and resident of said State with its chief office and principal

place of business in the City of Bloomington, County of McLean, State of Illinois.

2. The defendant, Morvin Duel, is now and since September 27, 1939, has been the duly appointed, qualified and acting Commissioner of Insurance of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, residing in the City of Madison, County of Dane and State of Wisconsin, and defendant's business office is located at the Wisconsin State Capitol, City of Madison, Dane County, State of Wisconsin.

[fol. 178] 3. During the year 1939 plaintiff made application to the Commissioner of Insurance of the State of Wisconsin in the manner and on the forms prescribed by said Commissioner for a license to do the various forms of automobile insurance business in the State of Wisconsin. After due investigation and consideration by the then Commissioner of Insurance, the said Commissioner being satisfied by such investigation that plaintiff had fully complied with all provisions of law applicable to it and that plaintiff's plan of operation, methods and practices in the conduct of its business and the character and value of its assets were and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin, made and entered a finding and order to this effect and thereupon issued to plaintiff on the 13th day of July, 1939, a license to transact all forms of automobile insurance business in the State of Wisconsin for the license period ending May 1, 1940. A copy of this license is hereto attached and made a part hereof and marked "Exhibit 1". That since said 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business and hold property in the State of Wisconsin under and pursuant to the statutes of said state.

4. That plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941, and plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith, and fully and promptly complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle plaintiff to a renewal of said licenses but notwithstanding, such application, compliance with law and payments, the said defendant,

as Commissioner of Insurance of Wisconsin, failed, contrary to law, to renew such licenses for plaintiff company and the agents at the time the original licenses expired. [fol. 179] That on or about the 18th day of May, 1940, the Commissioner of Insurance of Wisconsin, without having previously had any hearing and without opportunity for hearing, issued an order denying a renewal of license to plaintiff to do all forms of automobile insurance business in the State of Wisconsin for the license year ending May 1, 1941.

5. Thereupon this plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff, agents' licenses to each of its agents, and to enjoin and restrain said Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case. Said court action is now pending but is stayed because, pursuant to the provisions of Section 285.06, Wisconsin Statutes, and Section 266 of the Judicial Code, as amended, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 18, 1940, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 18, 1940, pending trial and ultimate disposition of said action and that such stay is still in full force and effect.

6. Thereafter on or before May 1, 1941, plaintiff seasonably and duly made application to the Commissioner of Insurance of the State of Wisconsin for a renewal of license to do the various forms of automobile insurance business in the State of Wisconsin for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff in Wisconsin, and to that end complied with all conditions and requirements to entitle the plaintiff and its agents to licenses. On [fol. 180] or about the 24th day of April, 1941, defendant notified plaintiff that he would refuse to renew plaintiff's license for the year ending May 1, 1942, and on or about the 5th day of May, 1941, the Commissioner of Insurance of Wisconsin issued a written order denying a renewal of

license to the plaintiff for the license year ending May 1, 1942. Said order and decision of May 5, 1941, was received by plaintiff on May 6, 1941.

7. Thereupon said plaintiff commenced another action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff, and to enjoin and restrain said defendant Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case.

8. Said proceeding is now pending in the United States District Court for the Western District of Wisconsin but is stayed because, pursuant to the provisions of Section 285.06, Wisconsin Statutes, and Section 266 of the Judicial Code, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 5, 1941, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941, pending the trial and ultimate disposition of said action and that such stay is still in full force and effect.

9. Thereafter, the above two actions brought by the Commissioner of Insurance of Wisconsin to enforce his orders denying a renewal of license to the Company in the Circuit Court for Dane County, Wisconsin, were consoli- [fol. 181] dated and heard as one before Honorable Arold F. Murphy, Circuit Judge, who entered an order on July 8, 1941, overruling the demurrers interposed by plaintiff State Farm Mutual Automobile Insurance Company to the original complaints of the Commissioner of Insurance in the suits filed in the Circuit Court for Dane County, Wisconsin, with leave to file an answer within twenty days. The plaintiff, State Farm Mutual Automobile Insurance Company, appealed these orders overruling demurrers to the Supreme Court of the State of Wisconsin.

10. The said Supreme Court of the State of Wisconsin, on January 13, 1942, (240 Wis. 161, 1 N. W. (2d) 887) made and entered its opinion and decision on demurrer, and solely on the basis of allegations in the complaint, and not

on the merits, holding that the use of the life membership plan of the plaintiff company was not permissible under the Wisconsin Statutes and affirmed the said orders of the Circuit Court for Dane County, Wisconsin. Thereafter, plaintiff State Farm Mutual Automobile Insurance Company made a motion for rehearing of the decision of January 13, 1942, and on March 13, 1942, the said Wisconsin Supreme Court made and entered its decision and order denying the said motion for rehearing.

11. In its opinion of March 13, 1942, (2 N. W. (2d) 871), on motion for rehearing, the Wisconsin Supreme Court restated the basis for its decision in the above causes in the following language:

> "Some concern is expressed in defendant's brief upon rehearing whether the scope of the opinion is sufficiently circumscribed. While we are of the view that it is, we see no objection to reiterating that the decision is put upon the ground that defendant's plan violates the statutes because of its use of a membership fee as the consideration for a life privilege—a fee to which is allocated a portion of the expenses of furnishing insurance protection, which is treated as earned at once and against which unearned premium reserves cannot be set up as required by the statutes."

[fol. 182] On April 13, 1942, the plaintiff was notified that the remittitur in the aforesaid causes was on that day filed in the Circuit Court for Dane County, Wisconsin. Thereupon, plaintiff herein (the defendant in the above actions), on or about May 2, 1942, duly filed its answers therein joined issue therein.

12. Thereupon, on or about the 15th day of April, 1942, the plaintiff State Farm Mutual Automobile Insurance Company, in full compliance in every particular with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department and with the construction of the Wisconsin Statutes relating to the rights of plaintiff and the power and duty of the defendant in the premises by the Wisconsin Supreme Court decisions of January 13, 1942, and March 13, 1942, made a new filing of rates and policy forms with the Commissioner of Insurance of the

St[illegible]e of Wisconsi[illegible] plaintiff
a[illegible] [illegible], 1942, the use of its
[illegible] in the State of Wisconsin, and plain-
[illegible] the 27th day of April, 1942, adopted and
[illegible] in Wisconsin a new policy and rates based on
[illegible]el premium plan for both new and renewal rates. A copy of such schedule of rates and such policy as now in use are hereto attached and made a part hereof and marked "Exhibit 2". On and before May 1, 1942, and ever since, plaintiff's plan of operation and its methods and practices in the conduct of its business are, in every particular, in full compliance with all provisions of the Wisconsin Statutes, and more particularly, in full compliance with all provisions of the Wisconsin Insurance Laws and the applicable rules and regulations of the Wisconsin Insurance Department, and plaintiff's methods and practices in the conduct of its business and the character and value of plaintiff's assets are such as to safeguard the interests of its policyholders [fol. 183] and the people of the State. The plaintiff on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. The level premium plan now used by the plaintiff in Wisconsin is the plan used by most of the automobile insurance companies in the State of Wisconsin and said level premium plan is approved by the defendant for use in Wisconsin.

13. On and before March 1, 1942, and ever since, plaintiff complied fully in every particular with all of the provisions of the laws of Wisconsin, and the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in Wisconsin and for the renewal of its agents' licenses and the appointment of new agents for the license period ending April 30, 1943, and plaintiff has paid all required and lawful fees, charges, and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin for the renewal of plaintiff's license and that of its agents for the period ending April 30, 1943, yet notwithstanding the foregoing defendant arbitrarily, capriciously, wilfully, and wrongfully refused to renew such license.

14. After the arbitrary and capricious refusal of defendant to issue a renewal of license to plaintiff for the license period ending April 30, 1943, said plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said defendant, as Commissioner of Insurance of Wisconsin, to issue such a renewal of license to plaintiff and to enjoin and restrain said defendants from interfering with plaintiff's business, agents and members, pending the trial and disposition of such suit. Said suit is now pending in said court and the temporary restraining order issued therein [fol. 184] is in full force and effect but the proceedings therein are held in abeyance because at a hearing on defendant's motion to dismiss plaintiff's bill of complaint in said Federal Court, it was agreed by counsel, at the said Court's suggestion and with the said Federal Court's approval, that an action be commenced in the Circuit Court for Dane County, Wisconsin, in order to obtain a ruling on the disputed issue by the highest state court. The foregoing procedure was agreed upon because of the contention by counsel for defendant that the issues raised by plaintiff's action to compel defendant to issue a renewal of license to plaintiff involved a construction of the powers and duties of defendant under Wisconsin Statutes, which, it was argued by defendant's counsel, had not been completely applied nor construed by the Wisconsin Supreme Court in its opinions of January 13, 1942 (240 Wis. 161, 1 N. W. (2d) 887), and March 13, 1942, (2 N. W. (2d) 871), and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court.

15. After commencement of the action in this court in May, 1942, to enjoin the defendant, Morvin Duel, as Commissioner of Insurance of the State of Wisconsin, from interfering with the plaintiff's business, agents or members pending the determination of the plaintiff's right to renewal of license for the license year ending April 30, 1943, the defendant filed its answer to said complaint and further filed a motion for summary judgment, which motion has been argued, briefs have been submitted and it is now under advisement by Honorable August C. Hoppmann, Circuit Judge, Dane County, Wisconsin.

16. Prior to the commencement of this action, and ever since, plaintiff complied fully in every particular with all [fol. 185] of the provisions of the laws of the State of Wisconsin and with the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin and a renewal of plaintiff's agents' licenses and the appointment of new agents for the license period ending April 30, 1944, and plaintiff has paid all required and lawful fees, charges and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin and for the renewal of plaintiff's license and that of its agents for the license year ending April 30, 1944, and plaintiff has complied fully with all of its contracts and agreements made with its policyholders; yet notwithstanding the foregoing, the defendant Commissioner of Insurance of Wisconsin has arbitrarily, capriciously, wilfully and wrongfully refused to renew plaintiff's license for the license year ending April 30, 1944.

17. The plaintiff, State Farm Mutual Automobile Insurance Company, was organized under the laws of the State of Illinois, and commenced business on June 7, 1922. Thereafter it was licensed to do business and is now lawfully operating in the following states, districts and counties, and it was first licensed in the year shown: Illinois, 1922; Indiana, 1925; Missouri, 1925; South Dakota, 1925; Minnesota, 1926; Tennessee, 1925; Colorado, 1927; Iowa, 1927; Kansas, 1927; Kentucky, 1927; Michigan, 1927; Nebraska, 1927; California, 1928; Mississippi, 1928; Montana, 1928; Nevada, 1928; North Dakota, 1928; Texas, 1928; Utah, 1928; Washington, 1928; Arizona, 1929; Idaho, 1929; New Mexico, 1929; West Virginia, 1929; Wyoming, 1928; North Carolina, 1930 (Company later withdrew but in 1939 again applied for a license and was relicensed); Oklahoma, 1930; Oregon, 1930; Virginia, 1930; Arkansas, 1931; Alabama, 1932, Georgia, 1932; South Carolina, 1932; Delaware, 1933; Maryland, 1933; District of Columbia, 1934; Florida, [fol. 186] 1934; Louisiana, 1935; Pennsylvania, 1937; Dominion of Canada, 1938; Wisconsin, 1939; New Jersey, 1940. In every single state, district and country, except Wisconsin, the plaintiff has in the regular course annually received its renewal of license. Plaintiff has annually filed

in every said state, district and country its sworn financial statement, report or other required data with reference to the solvency, reserves, surplus, methods, plan, operation and financial condition of the plaintiff, which statements, reports or data have been received, examined, accepted and approved by all of the above Insurance Departments except Wisconsin, as being in full compliance with their laws, rules and regulations. In addition, the financial status and operations of the plaintiff have been regularly examined at intervals by and under the direction of the National Convention of Insurance Commissioners, and plaintiffs's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus have been all approved on each such examination as being adequate and in full and complete compliance in every particular and detail with all of the provisions of the applicable laws, rules and regulations of the states, district and country in which plaintiff so operates, as above set forth.

The license of the company has never been revoked or renewal thereof refused in any state, district or country, except as hereinbefore noted in Wisconsin.

18. The plaintiff company is in sound financial condition. Its annual sworn statement as of December 31, 1939, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $18,439,481.93; that its total liabilities as of that date were $13,175,205.12, which included the general or contingent reserve of $2,500,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was [fol. 187] $5,264,276.81. Its annual sworn statement as of December 31, 1940, copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $21,490,934.62; that its total liabilities as of that date were $15,598,704.67, which included the general or contingent reserve of $2,750,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,750,000.00, was $5,892,229.95; plaintiff's annual sworn statement as of December 31, 1941, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $25,510,220.50; that plaintiff's total liabilities as of that date were $19,312,790.88, which included the general or contingent reserve of $3,-

000,000.00. Plaintiff's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000.00) was $6,197,429.62. Its sworn statement as of December 31, 1942, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $29,632,845.46; that its total liabilities as of that date were $20,637,863.07, which included a contingent reserve of $4,000,000.00. Plaintiff's surplus over all liabilities as of December 31, 1942, (in addition to said contingent reserve of $4,000,000.00), was $8,994,982.39.

As of January 1, 1940, the plaintiff State Farm Mutual Automobile Insurance Company was examined under the authority of the National Convention of Insurance Commissioners, of which the Wisconsin Insurance Department is a member, said examination covering the period from June 30, 1936, to and including December 31, 1939. The following states, acting for said National Convention of Insurance Commissioners, participated in said examination: Illinois, Arizona, Oklahoma and Kentucky; a copy of said report of examination is on file with the Insurance Commissioner of Wisconsin. As of December 31, 1939, said examination showed that the plaintiff company had total admitted assets of $19,152,455.05; that its total liabilities, including a [fol. 188] general or contingency reserve of $2,500,000.00 were $12,871,235.77, and its net surplus over and above all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was $6,281,219.28.

The surplus as shown by the examiners was in excess of the surplus as claimed by the company in the amount of $1,016,942.47. The increased surplus as shown by the examiners is due to the fact that they assigned values to certain assets of the plaintiff company greater than claimed by the company in its annual statement and they found and considered certain liabilities of the company to be less in amount than stated by the company in its annual statement.

It is the policy and practice of the National Convention of Insurance Commissioners in all cases of examination of foreign insurance companies to assign examiners from different states to make examinations of different companies, and to do so under general rules and regulations acceptable to such Convention and to the states who are members of such Convention. Thereby expense and time is saved to such states in obtaining frequent examinations and in keeping records of examination up to date. Generally each

periodic examination of licensed insurance companies, of which that described herein was one, is made by examiners representing a different group of states than that represented in the preceding and following examination. By this method the following states have from time to time participated in the examination of the plaintiff, viz:

Examination as of States Participating

December 31, 1927, Illinois, Minnesota, Kansas, Missouri, Texas, South Dakota and Indiana.

July 31, 1929, Illinois, Minnesota and South Dakota.

January 30, 1931, Illinois, Kansas, Nebraska, Washington, Texas and West Virginia.

June 30, 1933, Illinois, Missouri, Minnesota, Oklahoma and Virginia.

June 30, 1936, Illinois, Texas, Alabama, Indiana, Pennsylvania and Louisiana.

[fol. 189] December 31, 1939, Illinois, Arizona, Oklahoma and Kentucky.

In addition incident to licensing the plaintiff for the first time, some states have made independent examinations. That such Convention examinations and the conclusions and recommendations of the examiners representing such states have been submitted to all states in which the plaintiff is now licensed and does business and have been accepted by such states as true and correct.

The present contingent reserve in the amount of $4,000,000.00 above referred to was created and exists for any and all possible liabilities of the company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the company or its policyholders.

The surplus in the amount of $8,994,982.39 likewise is all available for the above purposes.

19. Plaintiff alleges upon information and belief that, at a hearing upon defendant's motion to dismiss plaintiff's complaint in the suit commenced by plaintiff in the United States District Court for the Western District of Wisconsin, counsel for defendant, in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country.

Plaintiff further alleges that in those states wherein plaintiff operates upon the life membership plan, such plan is in full compliance with all provisions of the law and applicable rules and regulations thereunder in such states. In the states wherein plaintiff operates on a level premium plan, such states other than Wisconsin have not objected and do not object to plaintiff's use of the life membership fee plan in the states wherein plaintiff uses such life membership fee plan.

[fol. 190] The life membership fee plan under which the plaintiff company does all of its business except in Texas, Louisiana and Wisconsin, where the company does business on the level premium plan, and Arizona where the company does business on the unlevel or so-called staggered premium plan, is as follows:

Each applicant for automobile insurance is required to pay a separate membership fee for each general class or kind of automobile insurance which he desires to purchase. The membership fee does not purchase insurance and is no part of the premium for insurance. The membership fee varies by insurance coverage and territory. The membership fee on an automobile risk for any given coverage, once paid, is never required to be paid again even though the applicant changes cars or lapses his insurance for a time and later reinstates the insurance. The contractual agreement between the defendant company and the policyholder as respects membership fees is as set out in the insurance policy used in such other states, and reads as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk."

This policy provision is contained in all policies pursuant to Section 1 of Article VII of the by-laws of the corporation, which reads as follows:

> "Membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy."

The purpose of the membership fee is to defray the expense of securing the new member and the expenses of inspection and determining whether the applicant is eligible to belong to a selected, safety-conscious group of automobile owners entitled to purchase and renew automobile insurance in the company at a minimum cost.

[fol. 191] Under this plan each applicant as a condition of admission to membership, himself bears the cost of establishing his eligibility to insure in the company. This relieves the existing policyholders of this cost and thus reduces their expense of insurance. Each new applicant, as he comes into the company, pays his own admission cost or expense as fixed by the company and such membership fee is earned at once by the company and is not returnable. Such life membership plan has been continuously used since the organization of the company.

The premiums, which vary as to coverage, type of car and territory where located, are collected separate from and in addition to the membership fees applicable. The first premium paid provides insurance for an original term of six months and the insurance may be automatically renewed for such successive periods of six months each as the required renewal premium is paid by the insured on or before the expiration of the then current term of insurance. The premium for each six-month term of insurance is and always has been entirely earned at the end of each six-month term. The rate of premium is based on the underwriting experience of the company for the various coverages, type of automobile, and territories, and is fixed by the Board of Directors of the company. Under the life membership plan the company does not make regular periodical payment of dividends to its policyholders, but accomplishes a saving to the policyholders by limiting its renewal premiums to the approximate net cost of providing insurance protection.

The premium charged by the company under its plan of operation are 20% to 35% less than the so-called conference rates, depending on the particular class of insurance carried. This lower cost of insurance is due to several factors:

(1) Plaintiff confines its risks to private passenger automobiles and the less hazardous forms of commercial cars

[fol. 192] and selects its risks carefully which results in a more favorable loss ratio*n* than enjoyed by most companies.

(2) All policies are issued in the home office of the plaintiff company, which relieves the agents of this work and enables the plaintiff company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business. Policies are not reissued upon renewal of the insurance, as is done by most companies, which further reduces the company expense of doing business.

(3) It collects its renewal premiums by mail direct from the policyholders, which relieve the agents of this work and enables the company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business.

(4) By collecting premiums direct from policyholders it escapes loss through bad accounts with agents suffered by many other companies where the agents collect premiums direct from the policyholders. By this means the company also escapes the cost which most companies have of maintaining accounts current with its agent.

(5) By reason of the fact that the premiums are collected in cash direct from the policyholder, the company is relieved of the expense of maintaining special agents in the field to verify accounts with agents and collect overdue premiums from agents.

The membership fee plan now being used by plaintiff in all states except Wisconsin, Louisiana, Arizona and Texas, has been and is recognized as valid and in full compliance with all of the provisions of the applicable laws of such states, and with the applicable rules and regulations of the Insurance Departments of such other states, and the plaintiff has complied in every particular with all reserve and other financial and other requirements of such other states and of the applicable laws therein, and all of the business done by plaintiff in such other states and plaintiff's operations and practices are in full compliance with all of the laws of the states in which plaintiff operates. In each state [fol. 193] where used the membership fee and the policy contract in respect thereto is accepted and recognized as lawful, and by the terms of the membership contract, n.em-

bership fees are held not to be a part of any premium; no reserve is required and no liability other than expressed in the membership contract exists either for reserves, refunds or otherwise. In accordance with the terms of the membership contract in each of said states the membership fees are "not returnable", and are fees as consideration "in addition to premiums". As such they reflect no liabilities for which reserves are required in such states. Plaintiff's method and plan of operation in such other states, as well as in Wisconsin, and the character and value of plaintiff's assets and reserves are in full compliance with law in such other states, as well as in Wisconsin, and are such as to safeguard the interests of plaintiff's policyholders and the people of the states in which plaintiff operates.

Prior to March 1, 1943, the plaintiff herein seasonably made application for a license for the license year ending April 30, 1944, and in connection therewith furnished all information and complied with all rules and regulations of the Department and with all laws of the State of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to and was and is entitled to a license for the said period; that this proceeding is brought for the purpose of enforcing the rights of the plaintiff to a renewal of license for the license year expiring April 30, 1944, and for the purpose of protecting its business and business operations in the State of Wisconsin and to enable the plaintiff to obtain a determination of the issues presented by the defendant in his failure or refusal to grant a renewal of license to plaintiff company for the period ending April 30, 1944.

20. Notwithstanding that plaintiff has fully and promptly complied with all laws, rules and regulations lawfully applicable to plaintiff as aforesaid, and notwithstanding that [fol. 194] plaintiff's plan of operation and its methods and practices in the conduct of its business and the character and value of plaintiff's assets were and are such as to safeguard the interests of its policyholders and the people of the state and that plaintiff is wholly solvent and in a strong financial position, and notwithstanding that it was and is the plain, unequivocal, ministerial duty of the Commissioner of Insurance of Wisconsin to renew plaintiff's license to do business in Wisconsin as aforesaid for the

period ending April 30, 1944, and to renew plaintiff's agents' licenses and to permit appointment of new agents of plaintiff, said Commissioner of Insurance of Wisconsin arbitrarily, capriciously, unreasonably, and in violation of law, has refused to issue to plaintiff a license to do all forms of automobile insurance business in Wisconsin for the license year ending April 30, 1944.

21. Such unwarranted, capricious refusal to renew plaintiff's license and that of its agents for the period from May 1, 1943, to April 30, 1944, unless restrained, will do irreparable injury to plaintiff and to plaintiff's business, for which plaintiff has no adequate remedy at law except by this action in equity for an injunction herein. The action of defendant, unless enjoined, would completely destroy the going business and the good will of plaintiff, whereby plaintiff would suffer damages and loss greatly in excess of $25,000.00 and such injury to plaintiff's good will and reputation would make it difficult, if not impossible, for plaintiff to recover its business after defendant, as Commissioner of Insurance of Wisconsin, has been compelled to renew plaintiff's license and that of its agents at the end of the litigation.

22. Plaintiff further shows that it verily believes unless defendant is restrained by order of this court that the said defendant, as Commissioner of Insurance of Wisconsin, will invoke upon this plaintiff large, unjust and unreasonable losses and irreparable losses and damages, for which plaintiff has no other remedy at law that is just or [fol. 195] adequate and that the writ of injunction is the only writ that can save and preserve to plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner and until defendant has been compelled to renew plaintiff's license for the license year ending April 30, 1944, at the end of this litigation. The plaintiff now has in force in the State of Wisconsin approximately 25,000 risks and plaintiff's annual premium income from such risks is in excess of $400,000.00 and plaintiff's business is rapidly growing. Plaintiff has established and now maintains in Wisconsin an administrative office and agencies and also a large sales force and staff with a loss adjustment bureau. Plaintiff now has in Wisconsin a force of approximately 500 agents, and plaintiff has invested, in

organizing and building up such establishment, in excess of $25,000.00.

23. Plaintiff shows that the defendant, as Commissioner of Insurance of Wisconsin, has only such powers and duties as are delegated to the office of the Commissioner of Insurance of Wisconsin pursuant to and by virtue of the statutes of the State of Wisconsin; and that defendant's order refusing to renew plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin for the period from May 1, 1943, to April 30, 1944, was an- is wholly erroneous, arbitrary, capricious and without warrant in law and in violation of the positive ministerial duty imposed by state upon defendant.

24. Plaintiff further alleges that the arbitrary, imperious, capricious, and unlawful refusal of the defendant to issue a renewal of license to the plaintiff for the license year ending April 30, 1944, by reason of the facts set forth herein, deprives the plaintiff of its property without due process of law and denies the plaintiff the due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, and the similar provisions of the Constitution of Wisconsin, and imposes an arbitrary, unreasonable and unlawful interference with the plaintiff's right of contract in viola- [fol. 196] tion of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10 of Article I of the United States Constitution.

25. Plaintiff further alleges that if the Statutes of Wisconsin are construed to permit the defendant, as Commissioner of Insurance, to exercise the broad powers said defendant claims, that is to refuse under Section 201.34, Wisconsin Statutes, to renew plaintiff's license for the license period ending April 30, 1944, said statute operates to impose an arbitrary and unreasonable interference with the right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10, Article I of the United States Constitution, and said statute as so construed denies to the plaintiff company the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

If the plaintiff were to be barred from the State of Wisconsin or were to withdraw therefrom with the issue open and undecided as to its right to a license and as to the power of the defendant to determine the legal effect of contracts in other states contrary to the decisions and determinations of courts and Commissioners of Insurance in such states, such action would cast a cloud upon all of its activities, would result in vast and irreparable damage, and would hamper and destroy its lawful business in Wisconsin and elsewhere. Such action would do vast and irreparable damage to the plaintiff in Wisconsin to the extent of destroying its sales and service organization, result in unnecessary cancellations of policies at vast and unnecessary expense to policyholders in the state. Not only would policyholders in this company suffer, but public interests would be damaged in that policyholders claimants, potential insurance buyers, agents in Wisconsin and elsewhere would likewise be injured and damaged. The uncertainty and cloud thus cast upon the plaintiff's business would be [fol. 197] a continuing and growing source of damage to the plaintiff and to the public as well.

Wherefore, the plaintiff respectfully prays that the said defendant, Morvin Duel, the Commissioner of Insurance of Wisconsin, his deputies, clerks, employees, agents, servants and attorneys, be permanently restrained and enjoined from interfering with the plaintiff's business, agents or members in the State of Wisconsin the conduct by the plaintiff of all forms of automobile insurance business in said state and as incidental to the final judgment herein that the defendant be required to issue to plaintiff and its qualified agents such licenses as are required by the law and to which plaintiff and its qualified agents are entitled as set forth herein; that during the pendency of this suit a temporary injunction issue restraining said defendant, his deputies, clerks, employees, agents, servants and attorneys, and all other persons acting under his authority or by his direction, from interfering with the plaintiff's business, agents or members in the State of Wisconsin and the conduct of all forms of automobile insurance business in said state; that pending the issuance of a temporary injunction a temporary restraining order issue enjoining and restraining the defendant, his deputies, clerks, employees, agents, servants and attorneys and all other persons acting under defendant's authority or by his direction, from interfering

with the plaintiff's business, agents or members in the State of Wisconsin in the conduct of all forms of automobile insurance business and that the plaintiff have such other further order, judgment and decree as may be equitable and proper in the premises and for the plaintiff's costs and disbursements in this action.

R. M. Rieser, One West Main St., Madison, Wisconsin; Herbert H. Naujoks, One North LaSalle St., Chicago, Illinois, Attorneys for the defendant, State Farm Mutual Automobile Insurance Company.

Rieser & Mathys, Ekern, Meyers & Matthias, of Counsel.

[fols. 198-200] EXHIBIT I TO BILL OF COMPLAINT

State of Wisconsin

Department of Insurance

This is to Certify, that the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, has complied with all the provisions of law, and is authorized to transact the business of —— (15) Automobile —— in the State until the first day of May 1940, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 13th day of July, 1939.

—— ——, Commissioner of Insurance. (Seal.)

[fol. 201] *Duly sworn to by Adlai H. Rust. Jurat omitted in printing.*

[fol. 202] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST

ADLAI H. RUST, being first duly sworn, on oath deposes and says that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, plaintiff

above named, to-wit: the Executive Vice-President of said plaintiff; that he is familiar with the facts hereinafter set forth; that he makes this affidavit for and on behalf of said corporation, being duly authorized thereunto; that said affidavit is made in support of a motion for temporary restraining order and temporary injunction; that the application for a temporary restraining order and temporary injunction herein is made in connection with a civil action in equity filed in this court to restrain and enjoin Morvin Duel, Commissioner of Insurance of the State of Wisconsin, from interfering with the business of the plaintiff and, incident thereto, to determine the powers and duties of the defendant as such Commissioner and his duty, to issue a license to the plaintiff company for the licensing year ending April 30, 1944; that the Wisconsin Supreme Court on January 13, 1942, and March 13, 1942, made and entered decisions holding that the use of a life membership plan by the plaintiff company in Wisconsin was not permissible under the Wisconsin Statutes, and based its decisions upon its [fol. 203] construction of the Wisconsin Statutes to the effect that it was improper to split premiums and designate part of the premium as a membership fee or separate charge; this conclusion was based primarily upon the construction by the Court of the reserve requirements of the Wisconsin Statutes; that on April 13, 1942, notice of the filing in the Circuit Court of Dane County, Wisconsin, on that date of the remittitur in said Wisconsin case was received by plaintiff's attorneys and plaintiff thereupon on April 15, 1942, notified the said Morvin Duel, Commissioner of Insurance of the State of Wisconsin, that plaintiff would on and after April 27, 1942, abandon in Wisconsin the use of its life membership plan and that said plaintiff would, on and after said April 27, 1942, use in Wisconsin a level premium plan, both for new insurance and in renewal of existing policies; that on and after the said 27th day of April, 1942, plaintiff has abandoned the use of its life membership plan in Wisconsin and has operated in Wisconsin solely on the level premium plan as aforesaid.

That the company was legally licensed in Wisconsin on July 13, 1939, and its operations have been and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin; that the plaintiff has in all respects complied with the conditions laid down in the Wisconsin Supreme Court decisions on January 13, 1942, and

March 13, 1942; that the plaintiff company has spent large sums of money in building an agency plan and developing its business in Wisconsin, which will be totally and irreparably lost unless the defendant is enjoined and restrained pending final determination of the issues presented herein and as prayed for in the complaint herein; that the company is wholly solvent, with total admitted assets in excess of $29,000,000.00, and that it has surplus over all liabilities in excess of $8,900,000.00 in addition to a contingent reserve [fol. 204] of $4,000,000.00, and that the interests of more than 25,000 policyholders in Wisconsin are fully protected and will in nowise suffer by reason of the issuance of a temporary restraining order or temporary injunction, pending a final determination of the issues herein; that the State of Wisconsin has received all taxes, charges and fees lawfully owing, and that the revenues of the State of Wisconsin will not suffer by reason of the issuance of a restraining order or temporary injunction pending a final determination of the issues herein.

Adlai H. Rust.

Subscribed and sworn to before me this 27th day of April, 1943. C. G. Mathys, Notary Public, Dane County, Wis. My commission expires: January 5, 1947. (Seal.)

[fol. 205] In Circuit Court of Dane County

[Title omitted]

Order to Show Cause

Upon reading the verified complaint and the affidavit of Adlai H. Rust herein, and it appearing from the facts shown by said verified complaint and affidavit that before notice can be served and a hearing had on plaintiff's application for a temporary injunction herein, or on the plaintiff's application for a restraining order, immediate and irreparable injury, loss and damage will result to plaintiff, to-wit: Plaintiff's business and plant in the State of Wisconsin would be destroyed and become useless and all activities therein would be suspended and interrupted and its good will and reputation elsewhere would be damaged if defendant's failure or refusal to renew plaintiff's license

to do business in Wisconsin for the period ending April 30, 1944, is not restrained and enjoined, inasmuch as plaintiff would be unable to operate lawfully in Wisconsin without a license and no new policies could be solicited or secured by plaintiff through its local licensed agents, and as a result said agents of plaintiffs would leave the employment of plaintiff to solicit and secure automobile insurance policies for competitors of plaintiff and the policyholders now residing in Wisconsin would be unable to obtain any services in connection with their policies in this state and this, among other things, would cause said policyholders not to renew [fol. 206] their insurance with plaintiff company, and thus such threatened action of defendant would completely destroy the going business and good will of plaintiff in Wisconsin and such injury and destruction of plaintiff's good will, reputation and business in said State of Wisconsin would make it difficult, if not impossible, for plaintiff to retrieve its business if, upon final determination of this matter, it should be held that the defendant, as Commissioner of Insurance of Wisconsin, is required to renew plaintiff's license to do all forms of insurance business in Wisconsin for the license year ending April 30, 1944; and such injuries are irreparable because they cannot be compensated for in damages and may subject plaintiff to fines and forfeitures; and there is danger that such irreparable injuries are liable to occur, and are threatened by the failure or refusal of the defendant to renew plaintiff's license before a hearing upon notice can be had;

Now, Therefore, It Is Ordered that the defendant, as Commissioner of Insurance of Wisconsin, show cause before Branch No. 2 of this court at the Court House in Madison, Dane County, Wisconsin, on the 4th day of May, 1943 at 10 o'clock in the forenoon, why the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks, employees, agents, and attorneys, should not be restrained and enjoined from interfering with plaintiff's business, agents or members in the State of Wisconsin, and the regular conduct of the business and affairs of plaintiff, and why pending the entry of final judgment herein the defendant should not permit the plaintiff and its agents and representatives to continue their business and operations as if the defendant had complied with the law and had issued a license to plaintiff and separate agent's licenses to the

individual qualified agents appointed by the defendant from time to time. Pending hearing upon this order to show cause and the entry of an order thereon, defendant is hereby [fol. 207] restrained and enjoined from interfering with plaintiff's business, agents, or members in the State of Wisconsin and from taking any steps to prevent the conduct of the plaintiff's business as heretofore.

This restraining order shall become effective upon the giving of security by the plaintiff by filing an undertaking in the sum of $1,000.00, conditioned upon the payment of such costs and damages as may be incurred or suffered by said defendant if if should be finally determined that said order was improperly issued or that may be awarded to defendant by reason of the granting of said order.

It Is Further Ordered that a copy of this order be served upon said defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, within three days from the date of this order.

Issued and entered this 29th day of April, 1943.

August C. Hoppmann, Circuit Judge, Branch No. 2.

[fol. 208] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

UNDERTAKING ON TEMPORARY RESTRAINING ORDER

The undersigned hereby undertakes that the plaintiff above named, the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, shall pay to the defendant above named, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, such costs or damages as may be incurred or suffered by the said defendant, Morvin Duel, or that may be awarded to said defendant by reason of the granting of the order or orders hereinafter described, not to exceed the sum of One Thousand Dollars ($1,000.00), including all loss or damage which may result from the issuance of the temporary restraining order now pending or a temporary injunction to be issued after hearing by the court herein if such injunction shall be issued

within one year from the date hereof, if it should be finally determined that the said temporary restraining order or the temporary injunction was improperly issued.

Dated this 29th day of April 1943.

Fidelity and Deposit Company of Maryland (Seal.)
By Reid M. Bergh, Agent.

Approved as to form & amount. August C. Hoppmann,

[fol. 209] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

Due and personal service of the within Answer admitted this 25 day of May, 1943.

R. M. Rieser, one of the Attorneys for Plaintiff.

ANSWER (1943 LICENSE CASE NO. 4)—Filed June 3, 1943

Now comes the defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for answer to the complaint herein, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2 and 3 of the complaint except the last sentence allegation of paragraph 3 and as to said allegation denies that since the 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business or hold property in the State of Wisconsin under and pursuant to the statutes of said state, and in this connection alleges that the plaintiff was not on said date and was not at any time thereafter and is not now qualified and entitled to transact business or entitled to hold property in the state of Wisconsin under the statutes of said state.

2. Admits that the plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941 and that plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith. Denies that the plaintiff fully or promptly or otherwise complied with all applicable laws [fol. 210] of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as

to entitle the plaintiff to a renewal of its said licenses. Admits that the defendant, as Commissioner of Insurance, refused to renew such licenses for the plaintiff company and its agents at the time that the original licenses expired and alleges that at all times since the defendant has refused to renew same. Denies that said refusal is contrary to law. Denies that the Commissioner's action of May 18, 1940 was without opportunity for hearing and in this connection alleges that the plaintiff's position and contention with respect to hearing before the defendant Commissioner of Insurance in relation to the order of the Commissioner of May 18, 1940 and the order of the Commissioner of May 5, 1941 (which later order is referred to in paragraph 6 of the complaint) was that the plaintiff did not want any hearing before the Commissioner thereon.

Defendant alleges that the circumstances relating to the order of May 18, 1940 were that the defendant had the plaintiff's application under advisement but that the defendant as Commissioner of Insurance, had taken no official action with respect to plaintiff's application for renewal of its said license and those of its agents when, on May 11, the defendant received a letter from the Director of Insurance of the state of Illinois inquiring as to the status of the plaintiff company in the State of Wisconsin and suggesting to the defendant that said Director would like to receive notice of the defendant's proposed action in relation to the plaintiff's application for renewal of its license to do business in the state of Wisconsin in advance [fol. 211] of defendant's official action in respect thereto. That in response to said letter the defendant duly notified the Director of Insurance as to defendant's official action in respect to said application by a letter dated May 18, 1940 and by forwarding with said letter a copy of the defendant's findings and decision in said matter; that said findings and decision set forth in detail the various statutes with respect to which the plaintiff company's method and plan were at variance and not in compliance as well as why the plaintiff company's methods and practices in the conduct of its business were not such as to safeguard the interests of its policyholders and the people of the state; that at the same time notice of said decision and findings were transmitted to Ekern & Meyers at Chicago, attorneys for the plaintiff company, who had represented it in obtaining

the original license and in the application for renewal thereof. That in defendant's letter to the Director of Insurance of the state of Illinois the defendant stated that if he received a statement from the company that it was withdrawing from the state within ten days it would not be necessary for the defendant to serve the said findings and decision upon the company and have the matter acted upon by the courts; that before the ten days expired the plaintiff company, without notifying the defendant that it intended to do so and without applying for any rehearing commenced the action in the United States District Court for the Western District of Wisconsin, referred to in paragraph 5 of the bill of complaint. Alleges that in that said action and as an ex parte matter, the District Court of the United States issued a temporary restraining order pending a hearing upon the company's application for a temporary in- [fol. 212] junction; that the defendant was duly notified of the date for hearing upon said company's application for temporary injunction in the District Court, the said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (28 U. S. C. A. Sec. 380).

3. Admits paragraph 5 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 18, 1940" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

Defendant alleges that he was unable to bring his action, instituted in the Circuit Court for Dane County, on for trial and disposition prior to the expiration of the 1941 license year due to the plaintiff company's requesting adjournments or continuances from time to time, some of which the defendant, upon request, agreed to but the last one

of which the defendant opposed and that the continuance granted by the Court with respect thereto was over the defendant's objection thereto.

[fol. 213] 4. Admits the allegations of paragraph 6 except the allegation that plaintiff complied with all conditions and requirements to entitle it and its agents to licenses, and denies same.

5. Admits the allegations of paragraph 7 and alleges that the plaintiff company in its action in the Federal District Court aforesaid again pursued the same remedy in the Federal Court and obtained, as an ex parte matter, a temporary restraining order from said Court pending a hearing upon the company's application for a temporary injunction; that the defendant was again duly notified of the date of hearing upon the company's application for a temporary injunction, said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (28 U.S.C.A. sec. 380).

6. Admits the allegations of paragraph 8 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

[fol. 214] 7. Admits the allegations of paragraphs 9, 10 and 11 except the allegation in paragraph 10 that the demurrer was "not on the merits", denies said allegation and alleges that the demurrer fully presented the case upon its merits.

8. Admits that on or about the 15th day of April, 1942, the plaintiff company attempted to file new rates and policy

forms with the defendant and admits upon information and belief that as of April 27, 1942 the plaintiff company abandoned the use of its membership fee plan in the state of Wisconsin; admits upon information and belief that plaintiff on and after the 27th day of April, 1942 adopted and put in force in Wisconsin a new policy and rate plan based on the level premium plan for both new and renewal rates. Admits that Ex. 2, attached to the complaint, is a copy of the schedule of rates and policy form attempted to be filed with the defendant. Alleges that the plaintiff was informed at the time of the attempted filing that the defendant could not accept same; that plaintiff's unearned premium reserves were not and would not be by the proposed change, within the requirements of the Wisconsin Statutes and that such proposed filing was not in compliance with the Supreme Court decisions referred to in paragraph 12 of the complaint in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the state of Wisconsin as construed by said Court in said decisions. Denies that said attempted filing or that the putting into operation of the new policy and rates above referred to was in full compliance with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department or with the construction of the Wisconsin Statutes [fol. 215] in the Supreme Court opinions hereinbefore referred to and in this connection alleges that said attempted filing and the putting into force said policy and rates in the state of Wisconsin and the attempting of the plaintiff to do business thereunder was not in compliance with the said Supreme Court decisions but in defiance thereof and for the reason that the plaintiff's unearned premium reserves do not meet the requirements of the Wisconsin Statutes as those requirements were construed in said opinions. Denies that the plaintiff's methods and practices in the conduct of its business are such as to safeguard the interests of its policyholders and the people of the state. In this latter connection the defendant alleges that the plaintiff has always justified its life membership fee plan of writing insurance in that such plan gives the insured a valuable right to insure in the company pursuant to the terms of the policy provision set forth on page 12 of the complaint. Alleges that the plaintiff company claimed the

right to be valuable in that the insured had a contract right to purchase insurance with the plaintiff company once the membership fee was paid, at its reduced rates, which rates were reduced because of payment of the life membership fee. The plaintiff company in its attempted filings of April 15, 1942 and its subsequent putting into operation a new level premium plan in the state of Wisconsin constitutes a breach and a complete abandonment by the plaintiff of the obligation assumed by plaintiff in the policy contract clause, hereinbefore referred to, in respect to all policyholders who, since plaintiff commenced doing business in the state, have paid to the plaintiff life membership fees for the claimed valuable right referred to.

[fol. 216] Defendant alleges that plaintiff has collected from policy holders in the state of Wisconsin, while it was unlawfully writing insurance upon a life membership fee plan, $137,737.50 in membership fees up to January 1, 1942, all of which money lawfully and in equity and good conscience belongs to and should be returned to said insureds as the plaintiff company cannot lawfully perform its contract obligation with them and has, by the new schedule of rates, abandoned its contract obligation with its said insureds. The defendant alleges that even if plaintiff's unearned premium reserves did meet the requirements of Wisconsin Statutes he would refuse to license the plaintiff company until it has returned to its insureds the life membership fees extracted from them and with respect to which it cannot give anything in return.

Admits that plaintiff, on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. Admits that the level premium plan or similar level premium plans now used by the plaintiff in Wisconsin are plans used by most of the automobile insurance companies in the state of Wisconsin and that level premium plans are approved by the defendant for use in Wisconsin.

9. Denies all allegations of paragraph 13 except those that plaintiff has paid all required and lawful fees, charges and taxes due the state of Wisconsin as a condition for doing business and admits same.

10. Admits the commencement by plaintiff of the action in the United States District Court for the Western District

of Wisconsin set forth in paragraph 14. Denies that de-
[fol. 217] fendant's refusal to issue the licenses was arbitrary or capricious. Admits the pendency of plaintiff's action commenced in the Federal District Court for the Western District of Wisconsin and that the ex parte temporary restraining order which plaintiff procured in said action was continued in full force and effect until such reasonable time as it would take plaintiff to commence an action in the Circuit Court for Dane County. Admits that such procedure was agreed upon at the suggestion of the judge of the Federal District Court for the Western District of Wisconsin but denies that it was the contention by counsel for defendant that the issues raised by plaintiff's action in said Federal District Court involved a construction of the powers and duties of the defendant which had not been completely applied or construed by the Wisconsin Supreme Court in the decisions referred to, and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court, and in this connection alleges that the defendant took the position in the said Federal District Court that the decisions of the Wisconsin Supreme Court referred to had completely disposed of the issue which plaintiff sought to raise in said action in the Federal District Court and which plaintiff seeks to raise in the action commenced in the Circuit Court for Dane County, Wisconsin (1942 action) and had disposed of said issue contrary and adversely to the plaintiff's position in that action and that defendant considered there was such little merit to the plaintiff's position that he proposed to dispose of the matter by motion for summary judgment in the two prior actions which defendant instituted in the Circuit Court for Dane County and referred to in para-
[fol. 218] graphs 5 and 8 of the complaint herein, but that if the foregoing position were not true and there did remain any issue of law not settled by said decisions, then it would follow that the plaintiff in its action in the Federal District Court was asserting rights in said court under Wisconsin statutes which called for official action and under circumstances where that official's duty had not as yet been determined by the highest court of the state and that for a Federal Court to attempt to forecast that duty would be an abuse of discretion and reversible error under the doctrine of the federal cases cited and that in either event the com-

plaint set forth no cause of action with respect to which the Federal Court could or should proceed.

11. Admits the allegations of paragraph 15 of the complaint.

12. Denies all allegations of paragraph 16 except those that the plaintiff has paid all required and lawful fees, charges and taxes due the State of Wisconsin as a condition for doing business and admits the same.

13. Admits upon information and belief paragraph 17, except the allegation that the convention examination and reports found plaintiff's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus in full and complete compliance in every particular and detail with all the provisions of the applicable laws, rules and regulations of the states, district and country in which the plaintiffs operates and with respect to said allegation denies same and alleges that the convention examinations and reports do not purport to find or determine whether the plaintiff company or any other company operates in full and complete compliance in every particular and detail with all the provisions of the applicable laws of [fol. 219] the various states, districts or countries in which a company operates and does business.

14. Admits the allegations of paragraph 18 of the complaint except the allegations that the plaintiff company is in sound financial condition and that the Convention examinations and the conclusions and recommendations of the examiners have been accepted as true and correct by all states in which the plaintiff is new licensed and does business and with respect to said allegations denies the same, and in this connection alleges that said Convention examinations and the conclusions and recommendations of the examiners have not been accepted by the State of Wisconsin as determinative of compliance with the solvency requirements of the Wisconsin statutes and further alleges that the plaintiff's life membership fee plan and method of operation which it uses in 38 out of 42 states, districts and countries in which it does business is such as to make it impossible to determine the plaintiff's surplus after setting aside unearned premium reserves as required by Wisconsin law and such as to make it impossible to compute and set

aside the required statutory unearned premium reserves and such as to make it impossible for the plaintiff to meet the solvency requirements of the Wisconsin unearned premium reserve law.

15. Denies upon information and belief that counsel for defendant, upon defendant's motion to dismiss plaintiff's complaint in the Federal District Court, purported to make a comprehensive statement as to all of defendant's major objections and reasons for refusal to grant the plaintiff and its agents licenses and in this connection alleges that there are major objections to licensing the plaintiff and its agents, [fol. 220] all of which have been asserted by the defendant at various stages of these proceedings, are matters of record therein and fully and completely known to the plaintiff, in addition to those set forth herein and which defendant is not asserting at the present time because of his belief that there is no merit to the present action for reasons herein set forth.

Defendant further alleges upon information and belief that the statement in paragraph 19 of the complaint "counsel for the defendant in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operated upon the so-called life membership fee plan in certain other states, district and country" is not an accurate statement with respect to counsel's statement and alleges that it is not the position of the defendant with respect to defendant's objection to plaintiff's life membership fee plan of operation used by the plaintiff in 38 out of the 42 states, districts and countries in which it does business and in this connection alleges that the defendant's objection to the life membership fee plan used in such states is not grounded upon the fact that the plaintiff uses such plan in said states or upon any question as to whether said plan is lawful or unlawful in said states, but that the plan itself, as used in said states is such as to make it impossible for plaintiff to comply with the unearned premium reserve laws and the solvency requirements in relation thereto with respect to foreign mutuals doing business in this state.

Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the second full sub-paragraph of paragraph 19 of the complaint, but [fol. 221] for purposes of this answer admits same. Admits that the plaintiff's life membership fee plan and its method of operation thereunder in all states except Texas,

Louisiana, Arizona and Wisconsin, since April 27, 1942, are substantially as set forth in paragraph 19 of the complaint, but alleges that for all purposes of the Wisconsin Statutes the plaintiff's life membership fee is "premium" and as such is not earned at once and cannot be treated as earned at once, and alleges that when the plaintiff company does business on the life membership fee plan as it did in Wisconsin until April 27, 1942 and as it does in all states except as above noted, the plaintiff company forecloses any possibility of its maintaining the unearned premium reserves required by Wisconsin law and required of all insurance companies doing business in Wisconsin, foreign and domestic.

Admits that the contractual agreement between the company and its policyholders, as set forth in the policy with respect to life membership fees is as alleged in the complaint, paragraph 19, the second sub-paragraph on page 14 and that the by-law of the plaintiff company with respect to membership fees is as alleged in the complaint, paragraph 19, the third sub-paragraph on page 14 of the complaint. Defendant has no knowledge or information sufficient to form a belief as to whether the purpose of the membership fee is as set forth in paragraph 19 of the complaint, the last sub-paragraph on page 14, but for purposes of this pleading admits same. Admits that the plaintiff company treats the life membership fee as one which by the contract is earned at once and as one which is not returnable and in this connection alleges that such is the plaintiff company's practice in all states in which it operates and uses [fol. 222] the life membership fee plan and alleges that as a fee treated as earned at once the plaintiff company sets up no unearned premium reserves at all with respect to such life membership fee. Admits that the life membership fee plan has been continuously used by the plaintiff company since the organization thereof.

Defendant has no knowledge or information sufficient to form a belief as to the remaining allegations in the first sub-paragraph of paragraph 19 on page 15 of the complaint, but for purposes of this pleading admits same. Admits that the allegations contained in paragraph 19 the second sub-paragraph on page 15 correctly state the company's practices with respect to its plan and method of operation under the life membership fee plan.

Admits that the "premiums" charged by the plaintiff (premiums designated as such in the policy) under its life membership fee plan of operation, are from 20 to 35 per cent less than the so-called conference rates, depending upon the particular class of insurance carried. Admits that the several factors (denominated (1), (2), (3), (4), and (5),) in sub-paragraph 9 of paragraph 19 of the complaint, pages 15 and 16, are factors which the plaintiff uses in its system of writing insurance and that the method of writing insurance used by the plaintiff company is as set forth in said sub-paragraphs. Admits that said methods have economy advantages and in this connection alleges that such economy factors have both advantages and disadvantages. Admits that the plaintiff has extended and operates under the life membership fee plan in 38 states of the union and Canada; admits that said plan is not now used in Wisconsin, but alleges that it was used in Wisconsin continuously [fol. 223] until April 27, 1942 Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 contained in the last sub-paragraph starting at the bottom of page 16 and continuing on page 17 of the complaint and therefore neither admits nor denies same, but for purposes of this pleading admits that so far as known to defendant plaintiff's life membership fee plan and its methods and practices thereunder are in compliance with the laws of said states where it is permitted to use said plan, but in this connection alleges that such plan is one which may upon superficial analysis receive administrative approval as was the case when Commissioner Mortensen licensed the plaintiff company in 1939 but is one which is vulnerable when subjected to judicial scrutiny and attack as was the case in Wisconsin, and further alleges upon information and belief that the plan has been subjected to judicial scrutiny and attack in few, if any, of the states, districts or countries in which the plaintiff company does business. Denies that plaintiff's assets and reserves are in compliance with the laws of the state of Wisconsin or that they are such as to safeguard the interests of plaintiff's policyholders and the people of this state.

16. Defendant admits that prior to the first day of May 1943 the plaintiff seasonably made application for a license for the license year ending April 30, 1944 but denies that

the plaintiff complied with all rules and regulations of the department or with all laws of the state of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to a license for said license period. The defendant admits that the plaintiff professes to bring this action for the purpose set forth in paragraph 19 of the [fol. 224] complaint, but in this connection alleges that the issue which plaintiff seeks to raise in the instant action has already been determined adversely to the plaintiff by the decisions of the Wisconsin Supreme Court, hereinbefore referred to, and that the plaintiff's action is wholly without merit.

17. Admits that the defendant refused to renew plaintiff's license to do business in Wisconsin for the period ending April 30, 1944, and to renew plaintiff's agents' licenses, but denies that said refusal was arbitrary, capricious or unreasonable. Denies that it was the ministerial duty of the defendant to issue any such licenses and in this connection, for reasons hereinbefore set forth, alleges that it was the plain duty of the defendant to refuse the renewal of such licenses.

18. Denies the allegations of paragraph 21 of said complaint and in this connection alleges that the plaintiff company has never lawfully conducted its business in Wisconsin and is not now doing so and that the plaintiff company never has been entitled to a license to do business in the state of Wisconsin and is not now entitled to such license or licenses.

19. Admits that the plaintiff now has in force in the State of Wisconsin approximately 25,000 risks and that plaintiff's annual premium income from such risks is in excess of $400,000 and rapidly growing; admits that plaintiff has established and now maintains in Wisconsin an administrative office and agencies and a large sales forces and staff with a loss adjustment bureau; admits that plaintiff now has in Wisconsin a force of approximately 500 agents and that the plaintiff has invested, in organizing and building up such establishment, in excess of $25,000, but in this con- [fol. 225] nection alleges that the plaintiff commenced doing business in this state by virtue of the license issued to plaintiff by Commissioner Mortensen on July 13, 1939, and which said license expired by its own terms on May 1,

1940; that the plaintiff knew at the time that it entered the state and commenced to build up its organization that it was extremely doubtful whether the plaintiff's method and plan of operation complied with the laws of the state of Wisconsin and whether such method and plan could be brought in compliance with the laws of said state. Alleges that when plaintiff's license expired it had only some 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff; that the plaintiff proceeded promptly with its first action in the Federal Court to tie the defendant's hands so it could go forward building up its organization so that it could continue to write its unlawful insurance. Alleges that whatever damage the plaintiff will suffer by reason of the defendant's refusal to license the plaintiff to do business in the state is *damnum absque injuria* and damage which the plaintiff has brought upon itself by its own action in the premises in its various attempts to thwart and defy the laws of the state and which said laws the plaintiff still seeks to set at naught, thwart and defy in the instant action.

The defendant admits that he intends to enforce the insurance laws of the state against the plaintiff, but denies that he will invoke upon the plaintiff large, unjust, unreasonable or irreparable losses and damages for which plaintiff has no remedy at law that is just or adequate and denies that the writ of injunction is the only writ that can save and preserve to the plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner [fol. 226] or until the defendant has been compelled to renew plaintiff's license for the license year ending Apr. 30, 1944 at the end of this litigation.

20. The defendant admits that as Commissioner of Insurance he has only such powers and duties as are delegated to him by virtue of the statutes of the state of Wisconsin but denies that his refusal to renew plaintiff's license for the period May 1, 1943 to April 30, 1944 was or is erroneous, arbitrary, capricious or without warrant in law or in violation of any ministerial duty imposed by statute upon the defendant.

21. Denies all allegations contained in paragraph 24 and the first subparagraph of paragraph 25 of the complaint.

22. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations in the second subparagraph of paragraph 25 of the complaint, but alleges that if any such results occur they are *damnum absque injuria* and results brought about by the plaintiff's conduct in the premises in violation of the laws of the State of Wisconsin.

23. Further answering and for a separate defense defendant alleges that the questions of whether the plaintiff company's unearned premium reserves are in compliance with the laws of the state, whether they can be made to comply therewith, whether for all purposes of Wisconsin laws plaintiff's life membership fees are premiums, all related questions, all questions passed upon by the Supreme Court in the decisions herein referred to, and all constitutional questions sought to be raised in paragraphs 24 and 25 of the complaint have been answered and determined adversely to the position and contentions of the plaintiff in the instant action in Duel v. State Farm Mutual Automobile Insurance Company, 240 Wis. 161 1 N. W. (2) 887 (motion [fol. 227] for rehearing denied by opinion, 2 N. W. (2) 871) and that all such matters are *res adjudicata*.

John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for Defendant.

[fol. 228] In Circuit Court of Dane County

[Title omitted]

Order as to Pleadings, Etc.—Filed June 20, 1943

Upon reading and filing the annexed written stipulation and being fully advised in the premises;

It Is Hereby Ordered that said Stipulation and the arrangement therein set forth is hereby approved; and

It is Hereby Further Ordered that the motion for summary judgment made by the defendant in the case commenced in this Court in 1942 bearing the same title as this case and referred to as Case No. 3, the decision on which motion is now pending, together with all affidavits and

proofs presented in said Case No. 3 as applicable to said motion, all arguments made in said Case No. 3 in respect to said motion, and all briefs of counsel submitted in said Case No. 3 in relation to said motion, shall be considered and stand as made, filed, presented and submitted in the present case to the same effect as if repeated herein.

Dated this 5th day of June, 1943 at Madison, Wisconsin.

By the Court, August C. Hoppmann, Circuit Judge.

[File endorsement omitted.]

[fol. 229] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

STIPULATION AS TO PLEADINGS, ETC.

It is hereby stipulated and agreed between the parties by their respective attorneys:

1. That the motion for summary judgment made by the defendant in the case commenced in this Court in 1942 bearing the same title as this case and referred to as Case No. 3, the decision on which motion is now pending, together with all affidavits and proofs presented in said Case No. 3 as applicable to said motion, all arguments made in said Case No. 3 in respect to said motion, and all briefs of counsel submitted in said Case No. 3 in relation to said motion, shall be considered and stand as made, filed, presented and submitted in the present case to the same effect as if repeated herein, and

2. That an order to the above effect may be made and entered herein to the above effect without any further notice to any of the parties.

Date: June 3, 1943.

Signed R. M. Rieser, Herbert H. Naujoks, Attorneys for Plaintiff; John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for Defendant.

May 26, 1943.

[fol. 230] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

Action Instituted in April, 1943

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT—Filed June 21, 1943

The defendant herein by John E. Martin, Attorney General for the State of Wisconsin, and Harold H. Persons, Assistant Attorney General, as his attorneys, moved the court for summary judgment dismissing the plaintiff's complaint herein. The plaintiff by R. M. Rieser and H. H. Naujoks, its attorneys, and Ekern, Meyers—Matthias of counsel, opposed the motion.

Upon the whole record and the motion papers, and after listening to the arguments of counsel and examining their briefs, and the court being fully advised in the premises;

It is ordered:

1. That the motion for summary judgment dismissing the plaintiff's complaint be and hereby is granted.

2. That no motion costs are allowed.

3. Let judgment be entered accordingly.

Dated, June 21, 1943.

By the Court: August C. Hoppmann, Judge.

[fol. 231] MEMO

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

[fol. 232] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

(Action IV—Instituted April, 1943)

JUDGMENT—Filed July 3, 1943

The above entitled action having been heard before the Court, without a jury, on the defendant's motion for summary judgment, the plaintiff appearing by its attorneys, Rieser & Mathys, represented by R. M. Rieser, and Ekern & Meyers, represented by Herbert H. Naujoks, and the defendant appearing by its attorney, John E. Martin, Attorney General of Wisconsin, represented by James Ward Rector, Deputy Attorney General and Harold H. Persons, Assistant Attorney General, and after considering the affidavits, records and documents attached to the motion of the plaintiff, the affidavits, records and documents submitted by the plaintiff in opposition thereto, and all of the records, files and proceedings herein and the arguments of counsel and briefs submitted, the Court having filed [fol. 233] a memorandum opinion and entered an order herein on the 21st day of June 1943 granting the defendant's motion for summary judgment dismissing the plaintiff's complaint and directing the entry of judgment accordingly;

It is hereby adjudged:

1. That the plaintiff's complaint herein and this action be and the same hereby are dismissed.

2. That neither of the parties shall recover any costs of the other, except that the defendant shall recover of the plaintiff the sum of $——, unpaid clerk's fees (to be inserted by the Clerk herein if not paid by the plaintiff).

3. That the temporary injunction heretofore entered on the 29th day of April, 1943, is hereby vacated and set aside.

Dated July 3rd, 1943.

By the Court, August C. Hoppmann, Circuit Judge.

Approved as to form prior to signature: R. M. Reiser, Attorneys for Plaintiff; H. H. Persons, Attorneys for Defendant.

[fol. 234] In Supreme Court of Wisconsin

[Title omitted]

(Action No. 3) Action instituted in May 1942

Minute Entry—Dec. 7, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Herbert H. Naujoks, Esq., R. M. Rieser, Esq., and E. A. Meyers, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 235] In Supreme Court of Wisconsin

[Title omitted]

(Action No. 4) Action instituted in April 1943

Minute Entry—Dec. 7, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Herbert H. Naujoks, Esq., R. R. Rieser, Esq., and E. A. Meyers, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 236] In Supreme Court of Wisconsin

Dane Circuit Court

Opinion by Justice Fowler

State Farm Mutual Automobile Insurance Company, an Illinois corporation, Appellant,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Respondent

(Action No. 3) Action instituted in May 1942

Judgment—Jan. 18, 1944

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed.

[fols. 237-238] In Supreme Court of Wisconsin

Dane Circuit Court

Opinion by Justice Fowler

State Farm Mutual Automobile Insurance Company, an Illinois corporation, Appellant,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Respondent

(Action No. 4) Action instituted in April 1943

Judgment—Jan. 18, 1944

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed.

[fol. 239] IN SUPREME COURT OF WISCONSIN

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

v.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 4)

Appeals from judgments of the circuit court for Dane County: August C. Hoppmann, Circuit Judge. *Affirmed.*

Actions in equity by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance for the state of Wisconsin. From summary judgments dismissing the complaints the plaintiff appeals. The controlling facts are stated in the opinion.

OPINION

[fol. 240] FOWLER, J.:

The plaintiff insurance company brought actions to enjoin the defendant insurance commissioner from interfering with the plaintiff in conducting an automobile insurance business in Wisconsin under its plan of conducting such business in the state and as incidental relief asked that the court require the defendant to issue to it a license to conduct such business. One action involves a license for the year 1942. A like action involves the year 1943. The defendant interposed answers and upon the pleadings and certain affidavits in support thereof moved for a summary judgment dismissing the complaints. Affidavits were filed by the plaintiff in opposition. The court granted judgments of dismissal.

These cases are sequels to a case between the same parties reported in 240 Wis. 161, et seq., 1 N. W. (2d) 887.

In that case the instant defendant was plaintiff and the suit was brought "to enforce orders of the plaintiff • • • declining to renew defendant's license to conduct the insurance business in the state of Wisconsin for the license periods" there involved. See p. 165 of the opinion. The gist of that controversy may be stated as follows: The company was doing business in face of the commissioner's refusal to renew its license. The company claimed it was entitled to a renewal and had submitted an application therefor that showed it to be so entitled, and the commissioner wrongfully refused to grant it. The commissioner refused to grant the renewal on the ground that the company had not set up the reserve required by sec. 201.18 (1) Wis. Stats., in that it had not included in such reserve [fol. 241] fifty per cent of the premiums received from its policyholders because it omitted therefrom fifty per cent of the membership fees received from them, which fees the commissioner contended were a part of the company's premiums. We held as matter of law that the membership fees were a part of the company's premiums and fifty per cent of them must be included in the reserve required by the statute above cited. On motion for rehearing interposed by the company that holding was adhered to.

The company was then and is now doing business in many states. In states other than Wisconsin it continues to exact the membership fees which we held in the former case are part of its premiums. Upon conclusion of the former case the company adopted a new scheme for doing business in Wisconsin and submitted it to the commissioner in applications for licenses for the years 1942 and 1943. The scheme is to require no membership fees from its Wisconsin policyholders but to do business in Wisconsin on a level premium basis, while continuing to exact membership fees in other states. The premiums required to be paid in Wisconsin are twenty-seven per cent higher than the premiums required in the other states that construe premiums as not including membership fees. This twenty-seven per cent difference represents the difference between the premiums here and elsewhere as the word "premium" is construed here and elsewhere. The commissioner refuses to grant the defendant the licenses required on the same ground that it refused renewal of the licenses applied for in the former case, viz: the reserve of the company required by sec. 201.18 (1) does

not include fifty per cent of the premiums received in other [fol. 242] states as it does not include fifty per cent of the membership fees required in other states.

The commissioner also asserts as ground for denying the company a license that the company unlawfully exacted membership fees from its Wisconsin policyholders prior to the former decision of this court, and he may require of the company a refund of the fees wrongfully exacted as a condition of issuing it a license. The idea seems to be that the company's hands are dirty and it must wash them before it can come into a court of equity. That the clean hands doctrine does not apply to the instant situation is obvious. The company could not because of its own wrong repudiate its insurance contracts with Wisconsin policyholders. It was liable on those contracts. The Wisconsin policyholders got valid insurance at the price they agreed to pay and at the price that policyholders in other states paid and at a price not in excess of the price at which it was customarily furnished by other insurance companies. The policy-holders themselves, having had the benefit of valid insurance, could not recover the part of the price covered by the membership fees. The commissioner can not require return of those fees in behalf of the policyholders when they could not themselves require return. He obviously can not require it in this own right. And he can not require it in enforcement of any public right both because he is not an officer in whom the power to enforce public rights is vested and because there is no statute imposing such return as a penalty for not complying with the statutory requirement. [fol. 243] Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned pre-

mium reserve for Wisconsin members fifty per cent of the premiums paid by them and fi per cent of the premiums paid in other states as those states construe premiums.

We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of

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Sec. 201.18 (1) Reserves, basis for. The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by sec. 201.50.

[fol. 244] what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1). That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. It requires the designated amount to be maint-ed wholly independent of the company's solvency in the sense that its assets equal its overall liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned with the

wisdom of the statute, nor with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or its other assets. We are only concerned with the carrying out of the legislative intent evidenced by it. Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The [fols. 245-246] company seems to think that its constitutional rights are in some way interfered with by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

We think this is all that need be said to support an affirmance of the judgment. If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case.

By the Court. The judgments of the circuit court are affirmed.

[fol. 247] IN SUPREME COURT OF WISCONSIN

[Title omitted]

(Case No. 4)

MOTION FOR REHEARING—Filed February 7, 1944

To John E. Martin, Attorney General; Harold Persons, Assistant Attorney General:

The above named appellant in the above entitled causes by its attorneys Ekern, Meyers & Matthias and Rieser & Mathys, hereby moves the above named honorable court for a rehearing in the above entitled causes for the reason that the decision heretofore rendered in said causes by said court on the 18th day of January, 1944, and the order of the court therein is contrary to law in the particulars which will be more fully stated in the printed brief to be filed by said appellant, and that there are uncertainties and ambiguities in

[fols. 248-249] said decision which require clarification as will likewise be pointed out.

Dated at Madison, Wisconsin, February 7, 1944.

Ekern, Meyers & Matthias, Chicago, Illinois; Rieser & Mathys, Madison, Wisconsin, Attorneys for Appellant State Farm Mutual Automobile Insurance Company.

R. M. Rieser, Herbert H. Naujoks, of Counsel.

Due service of the within Motion for Rehearing admitted this 7th day of February, 1944.

John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Asst. Atty. General, Attorney for Respondent.

[fol. 250] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTIONS FOR REHEARING—March 14, 1944

The Court being now sufficiently advised of and concerning the motions of the said appellant for a rehearing in these causes, it is now here ordered that said motions be, and the same are hereby, denied with $25.00 costs.

[fol. 251] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Titles omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed May 16, 1944

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, by their respective counsel, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States, that only the following portions of the record be included in the transcript of the record to be submitted to the United States Supreme Court, provided, however, that all documents and other portions

of the record otherwise required by the Revised Rules of the Supreme Court of the United States to be included in [fol. 253] such transcript, whether specifically mentioned in this Stipulation or not, shall be included in the Clerk's transcript;

1. The summons and complaint with exhibits attached in the 1942 action, Case No. 3, except Rate Schedules of Exhibit 2.

2. The answer in the 1942 action, Case No. 3.

3. The motion for summary judgment, by appellee Morvin Duel, with attached exhibits, affidavit of Morvin Duel and John Lange, but omitting the printed briefs and Exhibit E.

4. The affidavit of Paul Jones dated October 1, 1942.

5. The affidavit of Adlai H. Rust dated September 30, 1942.

6. The order and memorandum opinion of the Circuit Court for Dane County, Wisconsin, granting the motion for summary judgment.

7. The judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's action.

8. The notices of appeal to the Wisconsin Supreme Court.

9. The summons and complaint with attached exhibits in the 1943 action, Case No. 4, except Rate Schedules of Exhibit 2.

10. The answer in the 1943 action, Case No. 4.

11. The stipulation and order dated June 5, 1943, that the motion for summary judgment in Case No. 3 be applicable to the 1943 action, Case No. 4.

12. The motion for summary judgment.

13. Judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's action.

14. Decision and judgment of the Supreme Court of Wisconsin dated Jan. 18, 1943, affirming judgment of the lower court.

15. Decision of the Wisconsin Supreme Court dated [fols. 253-254] March 14, 1944, denying appellant's motion for rehearing.

16. Appellant's petition for allowance of appeals, including assignment of errors.

17. Appellant's statement of jurisdiction.

18. Order of the Wisconsin Supreme Court allowing appeal.

19. Copy of appellant's bond as approved by the Wisconsin Supreme Court.

20. Appellant's citation to appellee.

21. Appellant's statement of points to be relied upon.

22. Stipulation of the parties designating parts of the record to be transmitted.

Dated at Madison, Wisconsin, this 16th day of May, 1944.
R. M. Rieser, Herbert H. Naujoks, Counsel for Appellant. John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Assistant Attorney General, Counsel for Appellee.

[fol. 255] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 256] Supreme Court of the United States

Statement of Points to be Relied upon—Filed June 1, 1944

Comes now the appellant in the above entitled cause and states the points upon which he intends to rely in this Court in this case are as follows:

1. That the Supreme Court of the State of Wisconsin erred in finding and holding that Section 201.18 of the Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, required such foreign company to set up reserves on membership fees collected in states other than Wisconsin where such other states do not require any reserve on membership [fol. 257] fees and where there is no liability under the contracts and laws of such other states for the return of

any portion for such membership fees collected by the company in such other states.

2. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States of America as affecting contracts and operations of the said State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

3. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, constituted a deprivation of property of the State Farm Mutual Automobile Insurance Company without due process of law and beyond the power of the State of Wisconsin, and therefore invalid as in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid and void as in violation of the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States of America.

5. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and its contracts made in states other than Wisconsin, under the existing facts, was invalid as in conflict with Article I, Section 10, of the Constitution [fol. 258] of the United States, as impairing the obligation of contracts in violation of said constitutional provision.

6. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, so far as it purports to require the State Farm Mutual Automobile Insurance Company, an Illinois corporation, to set up reserves on membership fees collected in states other than Wisconsin, is invalid and void as violative to the Constitu-

tion of the United States and the decisions of the Supreme Court of the United States under such constitution as affecting contracts and operations of the State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

* * * * * * *

[fol. 259] R. M. Rieser, P. O. Address: 1 West Main Street, Madison, Wisconsin; Herbert H. Naujoks, P. O. Address: 1 North LaSalle St., Chicago, Illinois. Attorneys for Appellant.

Service of copy of the within admitted this May 3, 1944. Harold H. Persons, Assistant Attorney General, Counsel for Respondent.

[fol. 259a] [File endorsement omitted]

[fol. 260] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING THE RECORD—Filed June 12, 1944

It Is Hereby Stipulated by and between the parties to the above entitled proceeding now pending in the Supreme Court of the United States that in lieu and in place of the parts of the record designated by the appellant to be printed (R. 41-42), there be printed as and for the record in the Supreme Court of the United States the following parts of the record identified herein according to title and according to pages of the record as now filed in the Supreme Court of the United States:

[fol. 261]

Title of Paper	*Page of Record*
Petition for Allowance of Appeal, Assignments of Error, and Prayer for Reversal	1-5
Order Allowing Appeal and Fixing Bond	6-9
Copy of Bond (Omit)	10-12
Statement of Jurisdiction	13-38
Statement of Points to be Relied upon and Designation of the Parts of the Record to be printed (Omit last paragraph of page 41 and page 42 in view of this Stipulation.)	39-43
Citation, with affidavit of service (Omit)	44-46

Title of Paper	*Page of Record*
Stipulation	47-49
Appellee's Statement Opposing Jarisdiction	50-65
Pleas, Wisconsin Supreme Court	66
Notice of Appeal to Wisconsin Supreme Court and Undertaking	67-69
Complaint, 1942 Action, Case No. 3 (Omit summons and that part of Exhibit 2 appearing on pages 93-94 of the record.)	70-102
Answer, 1942 Action, Case No. 3	103-120
Motion for summary judgment, by appellee Morvin Duel	121-130
Affidavit of Paul F. Jones dated October 1, 1942	131-135
Affidavit of Adlai H. Rust dated September 30, 1942	136-170
Order and Memorandum opinion of the Circuit Court for Dane County, Wisconsin, granting the motion for Summary Judgment	171-172
Judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's Action	173-174
Notices of Appeal to the Wisconsin Supreme Court	175
Complaint, 1943 Action, Case No. 4 (Omit Summons and that part of Exhibit 2 appearing on pages 199 to 200 of the record.)	176-208
Answer, 1943 Action, Case No. 4	209-227
Stipulation and Order dated June 5, 1943	228-229
Motion for summary judgment (See pages 121-130) (Omit)	
Order and Memorandum Opinion of the Circuit Court	230-231
Judgment of the Circuit Court for Dane County, Case 4	232-233
Arguments, Wisconsin Supreme Court	234-235
Judgments, Wisconsin Supreme Court	236-237
Opinion, Wisconsin Supreme Court	238-245
Motion for Rehearing, Wisconsin Supreme Court	246-248
Order Retaining Record (Omit)	249
Order Denying Motion for Rehearing	250
Stipulation for Transcript of Record	251-254
Certificate of Clerk of Wisconsin Supreme Court (Omit)	255

It is stipulated that the parts designated as "omit" in the foregoing schedule of items comprising the record need not be printed in the Supreme Court of the United States and that the filing of this Stipulation shall take the place of the previous designation of the parts of the record to be printed appearing at pages 41 and 42 of the record.

Dated June 9th, 1944.

R. M. Rieser, Herbert H. Naujoks, Attorneys for the Appellant. John E. Martin, Attorney General. By Harold H. Persons, Assistant Attorney General, Attorney for the Appellee.

[fol. 263] [File endorsement omitted]

[fol. 264] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 115

ORDER NOTING PROBABLE JURISDICTION—October 9, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on cover]: File No. 48,557. Wisconsin Supreme Court, Term No. 115. State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Appellant, vs. Morvin Duel, Commissioner of Insurance of the State of Wisconsin. Filed June 1, 1944. Term No. 115 O. T. 1944.